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THE LAW  
OF  
EVIDENCE

(THIRD EDITION)

BY  
WILLIAM PAYSON RICHARDSON  
DEAN, BROOKLYN LAW SCHOOL  
ST. LAWRENCE UNIVERSITY

BROOKLYN—NEW YORK  
1928

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by

WILLIAM PAYSON RICHARDSON



## PREFACE

This is a third edition of the Law of Evidence, originally prepared in 1912, for the use of students in the Brooklyn Law School of St. Lawrence University. Because, quite unexpectedly, it found favor among attorneys, it was revised in 1923, with their needs in mind, by expanding the discussion of the principles and citations. It was thought that the terseness of statement and the precision and economy of citation which had made the students' edition attractive to attorneys, should ever be borne in mind, in an attempt to meet their needs more satisfactorily. Apparently, the emphasis on fundamentals, which is essential to a student, is fully as important in serving the busy lawyer, who desires a quick guide to the leading case on a particular question.

Accordingly this third edition has been prepared, with these principles in mind. The method which the users of the earlier editions found meritorious, has been retained. This edition is for students' use and, also, by reason of its restriction to leading authorities, a ready and quick attorneys' guide or trial manual. Except where the citation of other than New York authorities is necessary to an intelligent appreciation of the subject matter, cases of other jurisdictions and the historical common law authorities are not cited. Indeed, on most subjects, the New York cases form the best modern discussion of the existing rules of evidence.

The cases have been brought down to date and the new tendencies noted.

Recognizing that the value of the book is proportionate to and measured by the accuracy and completeness of the index, special effort has been devoted, in this, as in former editions, to this feature.

WILLIAM PAYSON RICHARDSON

September 1, 1928.



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# THE LAW OF EVIDENCE

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## CHAPTER I.

### DEFINITIONS AND JUDICIAL NOTICE

#### § 1. Evidence Defined.

"Evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." Greenleaf on Ev., 16th Ed., sec. 1. Professor Thayer defines it in the following language: "Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact." 3 Harvard Law Rev. 142.

In rendering a judgment the court must assume the existence or non-existence of certain facts, and as the facts do not ordinarily occur in the presence of the court, some method must be employed for imparting to it knowledge of the facts in issue. The information on which the court is to base its decision must be received according to certain prescribed rules of law. These rules we designate as the law of evidence.

#### § 2. Evidence and Proof Distinguished.

Proof is the effect or result of evidence. The evidence or information may or may not be sufficient proof to establish the alleged facts. To illustrate: If one is charged with issuing counterfeit money, it may be shown that he was in possession of spurious coins; that tools and instruments for making money were secreted on his premises; that he had made contradictory statements as to the charge against him; and his demeanor when arrested may be shown. Any or all of these might be evidence tending to show his guilt, yet not sufficient proof thereof. Greenleaf on Ev., 16th Ed., sec. 1.

### § 3. Direct and Circumstantial Evidence.

For a clear and concise discussion of direct and circumstantial evidence and their relative advantages, read the opinion in the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 723.

Direct evidence is that which tends to show a fact or matter in issue without the intervention of proof of any other fact. Evidence is direct and positive when the facts in dispute are sworn to by those who have actual knowledge of them by means of their senses; as, in the case of an assault, that the witness saw the defendant inflict the blow. But it frequently happens that no person was present on the occasion of the assault, and consequently that no one can be called to testify to it. The necessity of resorting to other means of proof is obvious. Crimes are secret. Most men, conscious of criminal purposes and engaged in the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions.

Circumstantial evidence is evidence that relates to facts other than those in issue, which, by human experience, have been found to be so associated with the fact in issue that the latter may be inferred therefrom.

Under certain conditions, from the proof of one fact or set of circumstances, we may reasonably infer or presume certain other facts; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved. *Commonwealth v. Webster*, *supra*; *State v. Avery*, 113 Mo. 475, 21 S. W. 193.

#### § 4. Relevant, Irrelevant, and Material Evidence.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other. Chamberlayne, *Modern Law of Evidence*, sec. 55. "Relevant" as applied to evidence, must be understood as touching upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of the facts disputed. Whatever evidence will withstand this test should not be objected to, unless to admit it would be to override some other formal rule of evidence. *Porter v. Valentine*, 18 Misc. 213, 41 N. Y. S. 507. The case of *State v. Ward*, 61 Vt. 153, 17 Atl. 483, presents the question as to the relevancy of an experiment by which a horse, supposed to have been driven by the accused, to the place where the accused is charged with committing arson, was subsequently driven over the same route. Left to itself and without guidance the horse made all the turns conforming to the theory of the prosecution's case including turning around at the destination and returning to the barn. The court said, in discussing the relevancy of this evidence, "We think the testimony had a tendency to create in the mind a persuasion that the horse had been there before—to render that fact evident. The question is not how strong a persuasion, but had it a tendency to create any? We think the invariable answer would be 'Yes,' and the testimony was properly admitted."

Evidence is irrelevant when it does not tend to establish or create a belief as to the existence or non-existence of substantial facts which are in issue. Thus, in an action to recover damages for the breach of a contract or where the existence of a contract is denied, the defendant should not be permitted to introduce evidence attacking the character of the plaintiff, because such evidence, since it does not tend to disprove the plaintiff's claim, is wholly irrelevant. *Tay-*

lor v. Heft, 150 App. Div. 509, 135 N. Y. S. 450, Richardson's Cases in Evidence, p. 132.

Evidence is material when it has an effective influence or bearing on the question in issue. Would the evidence, if introduced, tend to establish some controversial fact? If so, it is material. Porter v. Valentine, *supra*.

### § 5. Competent and Satisfactory Evidence.

The distinction between competent and satisfactory evidence is well stated by Greenleaf. He says: "By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of inquiry."

Satisfactory evidence is that amount of proof which is necessary to lead the jury to a conclusion.

The first question is, is the evidence competent, *i. e.*, shall it be admitted at all? The next question is, is the evidence sufficiently strong to satisfy an unprejudiced mind? The first is a question of law which must be answered by the Court. The second is a question of fact to be decided by the jury. Greenleaf on Ev., 16th Ed., sec. 2.

### § 6. Fact Defined.

Thayer defines a fact thus: "The fundamental conception of a fact is that of a thing as existing or being true." He says, "It is not limited to what is tangible, or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, when conceived of as existing, or being true are conceived of as facts." Thayer's Preliminary Ev., p. 191.

### § 7. What Need Not Be Proved.

Evidence is unnecessary to prove:

- a. That which is judicially noticed. Greenleaf on Ev., 16th Ed., sec. 3a.
- b. That which is presumed, unless and until evidence



rebutting the presumption is admitted. Thayer's Cases on Evidence, 2d Ed., p. 38.

c. That which is admitted either by the pleadings or by the parties in open court. Greenleaf on Ev., 16th Ed., sec. 186; People v. Walker, 198 N. Y. 329, 91 N. E. 806.

### **§ 8. Judicial Notice Defined.**

Judicial notice is the knowledge which a judge will officially take of a fact without proof. In *Neville v. Kenney*, 125 Ala. 149, 28 So. 452, at p. 454, it is thus defined: "Judicial knowledge of a fact is but a rule of evidence that dispenses with the necessity of offering evidence as to such fact." This doctrine is based largely on considerations of expediency and convenience, for there can be no judicial investigation without judicially noticing something.

In *Lumley v. Gye*, 2 El. & Bl. 266, 118 Eng. Rep. 749, it was said that "judges are not necessarily to be ignorant in court of what everybody else, and they themselves out of court, are familiar with."

### **§ 9. Judge's Private Knowledge.**

There is a real but elusive line between a judge's personal knowledge as a private man and his knowledge as a judge. As a judge he may have to ignore what he knows as an individual observer. In *Shafer v. Eau Claire*, 105 Wis. 239, 81 N. W. 409, it was held to be error for the trial judge to exclude a witness because the offer of his testimony was contrary to what the judge knew, from his own personal knowledge, to be a fact.

It is often difficult to distinguish between knowledge of a fact by observation and knowledge of a fact by notoriety (common knowledge); but the distinction is an important one, for in the former case a judge may not take judicial notice of the fact, whereas in the latter he may.

### **§ 10. Jurors' Private Knowledge.**

Jurors are required to base their conclusions entirely on the evidence in the case and must not permit their findings

to be influenced by any fact known to them personally and based on their own private observation. They are allowed, however, to act upon matters of common knowledge without any testimony on those matters, but such matters must, of course, be facts of which the Court may take judicial notice. It would be obviously absurd for proof to be required of all the simple and universally known facts of human existence. It would be equally absurd for the Court to be obliged to charge expressly in every case that it will take judicial notice of such facts. Where facts are so universally known and accepted as to be beyond dispute, both Court and jury may take them for granted. In a Massachusetts case the Court said: "Now everybody who knows what gin is, knows not only that it is liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin." *Commonwealth v. Peckham*, 2 Gray (Mass.) 514.

### § 11. Agreed Facts.

If an agreed statement of facts does not conform to what is judicially known, the latter will prevail. This was the rule recognized in *Russ v. City of Boston*, 157 Mass. 60, 31 N. E. 708.

### § 12. Judicial Notice Against Evidence.

Uncontroverted evidence establishing a fact does not preclude the Court from exercising its judicial knowledge and finding the facts to be otherwise. *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, 23 C. J., p. 38, note 26 (a), *Richardson's Cases in Evidence*, p. 4.

**§ 13. Judicial Notice by Appellate Courts.**

An appellate court may, for the purpose of reversing a judgment, judicially notice facts not brought out at the trial. *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, 23 C. J., p. 38, note 26 (a), *Richardson's Cases in Evidence*, p. 4.

**§ 14. Facts Judicially Noticed not Necessarily True Beyond Question.**

Taking judicial notice does not imply that the fact of which judicial notice is taken is true beyond question. It simply represents that there is a common opinion among people which has been so universally accepted that it has become a part of common knowledge that the given fact exists. Usually, however, what is judicially noticed is not a matter concerning which there is any controversy; as the location and boundaries of the Great Lakes, the course of the Hudson River, and other geographical features of the country. *Thayer's Cases on Evidence*, 2d Ed., p. 16, note 3.

**§ 15. What Will Be Judicially Noticed.**

No fixed rule can be laid down establishing what will be judicially noticed. Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, natural science, and law. *Greenleaf on Ev.*, 16th Ed., sec. 5.

In a general way, it may be said that courts will notice, without proof, all notorious facts; *i. e.*, facts which are a part of the general knowledge of the country.

In *Town of North Hempstead v. Gregory*, 53 App. Div. 350, 65 N. Y. S. 867, the Court said: "Whether a fact be judicially noticed as notorious obviously depends upon the particular view, the judicial knowledge, or the judicial reasoning of the Court as to the common knowledge of man thereof, or what is generally known. Care must be taken that the requisite notoriety exists. Every reasonable doubt must be resolved in the negative."

### **§ 16. Judicial Notice of Things Unknown to the Court.**

Judges frequently take judicial notice of matter which, at a given moment, may be unknown to them. In such cases recourse is had to such documents, references, and repositories as are worthy of belief and confidence. The court may also require assistance from the parties in thus instructing itself. *School District v. Insurance Co.*, 101 U. S. 472, 25 Law. Ed. 868; *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, 23 C. J., p. 38, note 26 (a), *Richardson's Cases in Evidence*, p. 4; *Munshower v. State*, 55 Md. 11; *Matter of Lithuanian Workers' Literature Society*, 196 App. Div. 262, 187 N. Y. S. 612.

### **§ 17. Classification of Things Judicially Noticed.**

There can be no particular sequential classification of things judicially noticed. But, for convenience, we shall classify matters which the courts will notice without proof, as follows:

1. Matters of law, and
2. Matters of fact.

## **I. MATTERS OF LAW**

### **§ 18. The Law of the Forum.**

Judicial notice will always be taken of the law of the forum, whether statutory or based upon judicial decisions.

### **§ 19. Public Statutes of the Forum.**

A state court will always take judicial notice of a public statute of its own state and it is, therefore, unnecessary to plead such a statute or offer it in evidence or even to call it specifically to the attention of the Court, although this may be done for the purpose of refreshing the judge's memory. *Long Island R. R. Co. v. City of New York*, 199 N. Y. 288, 303, 92 N. E. 681.

### § 20. Foreign Law.

No state court can take judicial notice of a common or statutory law of a sister state. The law must be pleaded and evidenced as any other fact before cognizance can be taken of it. It is well settled that a court cannot take judicial notice of a specific rule of law of another state or country, although it may take judicial notice of the general system of law upon which the jurisprudence of the country is based. See 34 L. R. A. (N. S.) 262, note; *Van Wyck v. Realty Traders Inc.*, 215 App. Div. 254, 213 N. Y. S. 28. The common law is presumed to prevail in all states except those which adopted the civil law, such as Louisiana. *Louisiana International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722. See, also, *Hanna v. Lichtenhein*, 225 N. Y. 579, 122 N. E. 625, 67 L. R. A. 34, note; *Hanley v. Donoghue*, 116 U. S. 1, 29 Law. Ed. 535, 6 Sup. Ct. Rep. 242, *Richardson's Cases in Evidence*, p. 15. Courts will take judicial notice that the common law was in force throughout the British Empire at the time of our separation and in the absence of proof to the contrary we presume, also, the law remains unchanged. *Stokes v. Macken*, 62 Barb. (N. Y.) 145. Judicial notice will be taken of the historical fact that the common law is not and never was in force in France and that the civil law is the foundation of French jurisprudence, but not of its details. *Matter of Hall*, 61 App. Div. 266, 70 N. Y. S. 406; *Barrielle v. Bettman*, 199 Fed. 838. The same rule applies as to the law of the Philippine Islands. *American Surety Co. v. Philippine National Bank*, 245 N. Y. 116, 156 N. E. 634.

### § 21. Federal Statutes.

All courts, federal and state, judicially know the Constitution of the United States and the public acts of Congress. *Ingersoll-Rand Co. v. United States Shipping Board Emergency Fleet Corp.*, 195 App. Div. 838, 187 N. Y. S. 695.



### § 22. Federal Courts.

The federal courts of original jurisdiction and the United States Supreme Court on appeal from their decisions are bound to take judicial notice of the Constitution and the public laws of each State of the Union and of the District of Columbia whether statutory or based upon judicial opinions. *Lamar v. Micou*, 114 U. S. 218, 223, 29 Law. Ed. 94, 5 Sup. Ct. Rep. 857; *Mills v. Green*, 159 U. S. 651, 657, 40 Law. Ed. 293, 16 Sup. Ct. Rep. 132. But in the exercise of appellate jurisdiction over cases appealed to the Supreme Court of the United States from the courts of the several states, the federal court will notice only the law that was judicially known in the court from which the appeal was taken. *Hanley v. Donoghue*, 116 U. S. 1, 29 Law. Ed. 535, 6 Sup. Ct. Rep. 242, *Richardson's Cases in Evidence*, p. 15; *Allen v. Alleghany Co.*, 196 U. S. 458, 464, 49 Law. Ed. 551, 25 Sup. Ct. Rep. 311; *Lane v. Sargent*, 217 Fed. 237, *Richardson's Cases in Evidence*, p. 19. Thus, in *Hanley v. Donoghue*, *supra*, the Supreme Court of the United States, on an appeal from Maryland's highest court, was asked to take judicial notice of the laws of Pennsylvania. This the Court refused. If, however, the appeal had been from the courts of Pennsylvania, her laws would have been judicially noticed.

### § 23. Private Statutes.

In the absence of constitutional or statutory requirements, no courts take judicial notice of private statutes or private acts of Congress, as distinguished from public acts. The doctrine of judicial notice applies, in strictness, to public or general statutes. *State v. H. & C. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700.

### § 24. Municipal Ordinances.

It is well settled in New York State that our courts may not take judicial notice of the ordinances and regulations of local boards and councils; and, contrary to the general rule in other jurisdictions, this rule applies to local and in-

ferior courts as well as to the Supreme Courts and courts of appellate jurisdiction. *People v. Cronin*, 91 Misc. 342, 154 N. Y. S. 446; *People v. Traina*, 92 Misc. 82, 155 N. Y. S. 1015, and cases there cited. The Civil Practice Act, sec. 388, provides for the manner in which such ordinances may be read in evidence.

### **§ 25. New York City Ordinances.**

A contrary rule now applies in the case of ordinances of the City of New York. The Greater New York Charter, sec. 1556, as amended by the Laws of 1917, Chapter 382, provides that "All courts in the city shall take judicial notice of city ordinances." As construed by the courts, this provision applies not only to courts such as the Municipal Court, whose jurisdiction is limited to the city, but extends to all courts situated within the city limits, including the Supreme Court. *Cohen v. Goodman & Sons, Inc.*, 189 App. Div. 209, 212, 178 N. Y. S. 528. And in *Greenberg v. Schlanger*, 229 N. Y. 120, 127 N. E. 896, although the city ordinance upon which the plaintiff relied was not offered in evidence, it was held that, as the case was tried in New York City, the Court of Appeals would take judicial notice of it.

## **II. MATTERS OF FACT**

### **§ 26. Matters of Fact Judicially Noticed.**

All matters of fact which are notorious, and with which the judicial function supposes the judge to be acquainted, either actually or in theory, will be recognized as true, without requiring the production of evidence.

We herewith submit some of the notorious facts which the courts notice.

### **§ 26a. Departments of Government.**

Courts will judicially notice all public officers in civil affairs within their jurisdiction and their authority, as prescribed by the Constitution or public statute. 23 C. J., p. 97, sec. 1888. This knowledge extends to all three departments of government.

### § 27. Executive Department.

Courts will judicially notice who are or were, at any time, the executive officers of a state, *i. e.*, governor, attorney general, tax-officials, superintendent of banking, and of insurance, etc. 23 C. J., p. 97, sec. 1889. Judicial notice will also be taken of county officers, such as auditors, commissioners, supervisors, registers, treasurers, etc. *New York v. Vandever*, 91 App. Div. 303, 86 N. Y. S. 659.

The New York Courts may not take judicial notice of the acts of officers of a sister state. *People v. Warden of City Prison*, 220 N. Y. S. 529. That the court may take judicial notice of the practical constructions of the provisions of the statute is set forth in *Armitage v. Board of Education*, 122 Misc. 586, 203 N. Y. S. 325, affirmed 240 N. Y. 548, 148 N. E. 699, where the court says: "Another well recognized canon of construction is that the court may take judicial notice of the practical construction of the provisions of a statute given to it by administrative officers charged with its application and enforcement, and that such interpretation is entitled where the meaning of the statute is doubtful to great if not controlling weight." The Federal officers of the government are judicially known. 23 C. J., p. 98, sec. 1892. "The regulations promulgated by the federal government by executive order may be taken judicial notice of by the court." *Matter of Rosenberg*, 208 App. Div. 707, 202 N. Y. S. 324.

### § 28. Legislative Department.

The existence of the legislature and the time and place of holding its sessions are judicially known. It is said that the proceedings of the legislature, as shown in its journal, are noticed, but this is only in theory, for the practice is to use a printed or certified copy of the proceedings as contained in the journal. *Wigmore on Ev.*, secs. 1662, 1684. *Rumsey v. New York C. R. R. Co.*, 130 N. Y. 88, 28 N. E. 763. See cases collated in *Field v. Clark*, 143 U. S. 649, 661, 36 Law. Ed. 294, 12 Sup. Ct. Rep. 495.

**§ 29. Judicial Department.**

The organization, jurisdiction and powers of courts will be noticed by the judges presiding therein. 23 C. J., p. 103, sec. 1907. State courts judicially know who are the judges, permanent or temporary, present or past, their term of office, their salaries, and their official signatures. *Kilpatrick v. Commonwealth*, 31 Pa. 198, *Wigmore's Cases*, No. 641.

In New York a court may take judicial notice of a record in the same court either of the pending action or another action. *Matter of Ordway*, 196 N. Y. 95, 89 N. E. 228.

**§ 30. Seals and Signatures.**

Judicial notice is also taken of the seals of states, and of the signatures and official seals of prominent state and county officials. 23 C. J., pp. 98, 99.

**§ 31. Election of Officers.**

The time of holding elections and the officers to be elected are noticed, but the date of elections in one state is not judicially known by the courts of other states. 23 C. J., p. 92, sec. 1884. *Taylor v. Rennie*, 35 Barb. (N. Y.) 272, 22 How. Pr. (N. Y.) 101.

**§ 32. Political Divisions.**

The political divisions of the government within which courts exercise jurisdiction are judicially known. Notice is also taken of counties, their area, boundaries, location, names, and dates of their organization. That a town or city is within a certain county will be noticed, but not a particular tract of land. *People v. Wood*, 131 N. Y. 617, 30 N. E. 243.

**§ 33. Foreign Governments.**

Judicial notice will also be taken of the existence of foreign governments, their proper title, their flags and seals. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404. It was held in *Oetjen v. Central Leather Co.*, 246 U. S. 297, 301,

62 Law. Ed. 726, 38 Sup. Ct. Rep. 309, that the court would take judicial notice of the fact that the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico on October 19, 1915, and as the *de jure* government on August 31, 1917, and similarly, in *Russian Socialist Federated Soviet Government v. Cibrario*, 198 App. Div. 869, 191 N. Y. S. 543, that the Court would take judicial notice that the Russian Soviet Government has never been recognized as a sovereignty by the executive or legislative departments of the United States Government.

### § 34. Course and Laws of Nature.

The existence of facts which must have happened according to the constant course of nature, such as the alternation of day and night, the return of the respective seasons with their concomitants of heat and cold, and the varying changes in animal and vegetable life, will be noticed; so, also, natural law which enables frost to arrest decay in animal and vegetable life. *Brown v. Piper*, 91 U. S. 37, 23 Law. Ed. 200, *Richardson's Cases in Evidence*, p. 1.

### § 35. Sun and Moon.

The time of the rising and setting of the sun and moon will be noticed, and, for this purpose, the court will admit, not strictly as evidence but for the purpose of refreshing the recollection of the court and jury, any reputable almanac containing tables giving the periods of the rising and setting of the sun and moon on each day of the year. *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414; *Case v. Perew*, 46 Hun 57; *Montenes v. Met. St. Ry. Co.*, 77 App. Div. 493, 78 N. Y. S. 1059; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860, *Richardson's Cases in Evidence*, p. 9.

### § 36. Course of Agriculture.

Judicial notice will be taken of the course of the seasons and husbandry, and the general course of agriculture, and that a crop at a certain date would not have matured, *Floyd*



v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; Casper v. Frederick, 146 Minn. 112, 177 N. W. 936; and within the territorial jurisdiction of the court, of the time for planting crops, Wetzler v. Kelly, 83 Ala. 440, 3 So. 747; and in New York, that garden crops are not growing after the middle of November, Corsall v. State, 107 Misc. 266, 176 N. Y. S. 420; but not of the precise day at which a given crop reaches maturity, Dixon v. Nicholls, 39 Ill. 372, 89 Am. Dec. 312.

### § 37. Qualities and Properties of Matter.

The courts will judicially notice the general qualities and properties of matter as demonstrated by universal experience. The following illustrate the application of the principle: that natural gas is explosive, Jamieson v. Ind. Nat. Gas Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; dynamite is intrinsically dangerous, Fitzsimmons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; camphor treatment of woolen garments for the purpose of keeping out moths is the usual method adopted for this purpose, Hamilton v. Ward, 181 N. Y. S. 31; the well known qualities of tobacco and the use commonly made of it, Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; cigars and tobacco are not drugs and medicine, and the court may exclude the testimony of a witness who offers to testify that they are, Commonwealth v. Marzynski, 149 Mass. 68, 21 N. E. 228. The Supreme Court of the United States held it could not judicially know that the use of tobacco in the form of cigarettes was injurious. Austin v. Tennessee, 179 U. S. 343, 45 Law. Ed. 224, 21 Sup. Ct. Rep. 132. *Contra*, Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478. It is a matter of widespread scientific belief and declaration that a wet tree is a ready conductor of electricity and that a person standing under such a tree is exposed to a degree of danger which does not confront one in the open spaces of a highway or field. Madura v. City of New York, 238 N. Y. 214, 144 N. E. 505.

The court may take judicial notice that tincture of iodine, spirits of camphor, and tincture of arnica are medicines,

within the meaning of the Pharmacy Law prohibiting the sale of medicines or poisons except in the presence and under the supervision of a licensed pharmacist. *Laws of 1900*, sec. 667; *State Board of Pharmacy v. Matthews*, 197 N. Y. 353, 90 N. E. 966.

But the courts cannot judicially know the color of natural butter or of oleomargarine, because the color is not uniform. *People v. Hillman*, 58 App. Div. 571, 69 N. Y. S. 66; *People v. Meyer*, 44 App. Div. 1, 60 N. Y. S. 415.

### § 38. Time, Days, and Dates.

Courts take judicial notice of the computation of time, as the coincidence of days of the week with days of the month. *Cohn v. Kahn*, 14 Misc. 255, 35 N. Y. S. 829; *Matter of Seymour*, 113 Misc. 421, 424, 185 N. Y. S. 373. The subdivision of the day into hours and their order of succession will also be noticed. In *Safford v. Douglas*, 4 Edw. Ch. (N. Y.) 537, the Court took judicial notice of the fractional parts of a day in determining the priority of liens created by the filing of different creditors' bills on the same day.

### § 39. Scientific Facts.

Courts take judicial notice of such matters of art and science as are generally recognized and ought to be known to men of common understanding, and of their practical application. To illustrate: judicial notice will be taken of the use of telephones, the principle of the ice cream freezer, the difference in time in different longitudes, that there is a magnetic meridian and that the compass varies therefrom in a particular direction. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575; *Brown v. Piper*, 91 U. S. 37, 23 Law. Ed. 200, *Richardson's Cases in Evidence*, p. 1. The mechanical and chemical processes employed in the art of photography and the scientific principles on which they are based and their results will be judicially noticed. *Cowley v. People*, 83 N. Y. 464, 476, 38 Am. Rep. 464. A judgment based on testimony contrary to natural and physical

laws should be reversed. *Szpyrka v. International Railway Co.*, 213 App. Div. 390, 210 N. Y. S. 553.

#### § 40. Weights, Measures, and Values.

No proof is required of standard weights, or of the value of a circulating medium, or of measures legally established or in common use, as, for instance, that a quart is less than a gallon. But judicial knowledge extends only to standard values and not to the value of particular articles or services. *Millener v. Driggs*, 10 N. Y. St. Rep. 237. However, a well known and marked change in the value of a commodity will be noticed, as the depreciation of German securities due to the World War. *Erdreich v. Zimmerman*, 190 App. Div. 443, 449, 179 N. Y. S. 829; *Zimmerman v. Roessler & Hasslacher Chemical Co.*, 240 N. Y. 501, 148 N. E. 659.

#### § 41. Facts Relating to Human Life.

Well known facts relating to human life will be judicially noticed. Thus, you need not prove the ordinary length of human life, *Johnson v. H. R. R. Co.*, 20 N. Y. 65; the diseases to which men are subject, *Kiernan v. Metropolitan Life Ins. Co.*, 13 Misc. 39, 34 N. Y. S. 95; the habits and the curiosity of children — lumber piled in a street would tend to attract children, *Spengler v. Williams*, 67 Miss. 1, 6 So. 613; the eye may be readily mistaken as to the actual nature of the thing observed, *Biddles v. Enright*, 239 N. Y. 354, 146 N. E. 625; the period of gestation is 280 days, *Matter of Wells*, 129 Misc. 447, 221 N. Y. S. 714; and the ordinary proportions of the human body, *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, 23 C. J., p. 38, note 26 (a), *Richardson's Cases in Evidence*, p. 4.

In *Hunter v. New York, Ontario & Western R. R. Co.*, *supra*, the action was to recover for personal injuries sustained by the plaintiff while passing through a tunnel on the top of a freight car of defendant. The height of the tunnel was considerably lessened, in the interior, by an arch, not visible at the entrance, but beginning two hun-

dred feet from it, inside, and of this lessening the plaintiff had no notice. The injuries appeared to have come from striking the plaintiff's head against the arch. But his own testimony was that he was sitting when the accident happened. The distance between the top of the car and the inside of the arch at the top was four feet and seven inches. The trial judge had left it to the jury that, "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." After verdict and judgment the defendant appealed, and the Court of Appeals put the question thus: "Whether we will accept that finding — or whether we will take judicial notice of the height of the human body and the measurements of its separate parts, and—reverse a judgment that is based upon a finding clearly contrary to the laws of nature." In proceeding to grant a new trial the Court took judicial notice that the average height of a man is less than six feet, and the average length of the human trunk to the top of the head is less than three feet, and that men differ in height mainly from a difference in the length of their legs; that this plaintiff could not have struck his forehead against the arch while sitting, unless he were at least nine feet high, and that there is no authenticated instance in human history of any such height; that while the plaintiff may have been a tall man, and the jury may properly have acted upon their inspection of him, "a fact so rare in the course of nature should be made apparent, in some way, on the record." On the second trial of Hunter's case, the brakeman testified that "he rose up as he entered the tunnel," and a new verdict for the plaintiff was not disturbed. *Hunter v. New York, Ontario & Western R. R. Co.*, 10 N. Y. S. 795, *aff'd* 130 N. Y. 669, 29 N. E. 1034.

#### § 42. Animal and Vegetable Life.

Prominent facts relating to animal and vegetable life will be noticed by the courts without proof. 23 C. J., pp. 154-157. To illustrate: a court will judicially notice that a mule is a domestic animal of a treacherous and vicious nature.



*Borden v. Falk Co.*, 97 Mo. App. 566, 71 S. W. 478. In *Consolidation Coal Co. v. Pratt*, 169 Ky. 494, 184 S. W. 369, L. R. A. 1916D 1229, the Court said: "The kicking propensity of a mule is a matter of common knowledge and has been the subject of comment from the earliest time. It is almost as universally recognized as the fact that a duck will swim or a cat will scratch." Judicial notice will be taken of the fact that potatoes are a perishable product, not lasting over one season, *Hurst v. Hill*, 96 Or. 311, 188 Pac. 973; but not that onions are perishable property so that a short delay in shipment would cause them to freeze, *Mankoff, Inc. v. Erie Railroad Co.*, 97 Misc. 421, 161 N. Y. S. 345.

#### § 43. Common Belief of People.

The courts will judicially notice the common belief of the people, as, for instance, that vaccination is a preventive of smallpox, *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97; and that night work in factories is injurious to the health of women, *People v. Charles Schweinler Press*, 214 N. Y. 395, 405, 108 N. E. 639.

#### § 44. Geographical Facts.

The prominent geographical features of the territory over which a court exercises jurisdiction and of the country at large need not be proved. The wheat growing regions of the country are also judicially known. In *Gothing v. Newell*, 9 Ind. 572, 583, the Court said: "We know as matter of general knowledge that parts of Ohio, Minnesota and Michigan are wheat growing regions and as well adapted to the use of the drill as in Illinois." Common knowledge of the well known commercial cities and their situation as related to tide water need not be proved. *Parks v. Jacob Dold Packing Co.*, 6 Misc. 570, 27 N. Y. S. 289; *Ex parte Davidson*, 57 Fed. 883, 887. Lakes, streams, mountains, and the navigable waters are judicially noticed. "To attempt to prove that the Mississippi or Missouri are navigable streams would seem an insult to the intelligence of



the Court." *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330. But the courts cannot notice at what particular place between the mouth and source navigability ceases. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 698, 43 Law. Ed. 1136, 19 Sup. Ct. Rep. 770. The presumption of general knowledge weakens as we pass to smaller and less known streams. *Decamp v. Thomson*, 16 App. Div. 528, 44 N. Y. S. 1014.

#### § 45. Location and Operation of Railroads.

The courts take judicial notice of the existence and location of railroads. "Railways are public highways; and it is a matter of history that important lines of railways once established have remained as fixed and permanent in their course as the rivers themselves. Their locality becomes so notorious and indisputable that the courts will take notice thereof. Their location is a physical and geographical fact of undisputed notoriety." *Miller v. Texas & N. O. R. R. Co.*, 83 Tex. 518, 520, 18 S. W. 954; *People v. State Board of Tax Commissioners*, 67 Misc. 474, 123 N. Y. S. 609. In *Cull v. Union Railway Co.*, 192 App. Div. 649, 653, 183 N. Y. S. 275, judicial knowledge was taken of the fact that cars will lurch in rounding curves so that the mere fact that a car did lurch is no proof of negligence.

#### § 46. Location of Streets.

No proof is required that the streets in New York City are numbered east and west from Fifth Avenue and that the odd numbers are on the north side of the street, nor of the general direction of streets and avenues and where they begin and end. *Skelly v. N. Y. El. R. R. Co.*, 7 Misc. 88, 27 N. Y. S. 304, *aff'd* 148 N. Y. 747; *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. S. 413.

#### § 47. Distance and Time of Travel Between Places.

The distance and time of travel between places is noticed. This naturally follows as a result of noticing the location

of cities and towns. *Pierce v. Langfit*, 101 Pa. St. 507. In *Williams v. Brown*, 53 App. Div. 486, 65 N. Y. S. 1049, the Court took notice of the geographical location of New York City, and of Perth Amboy, New Jersey, and that the time for railroad travel and for the transportation of mail between these places is less than two days. That East Portland, Oregon, is distant 2,398 miles from Crawfordsville, a place of trial in Indiana, was noticed in *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118, 1123.

#### § 48. History.

Well known historical facts, sacred and secular, are noticed. Illustrations: slavery existed in certain states and was abolished by the civil war, *Swinnerton v. Columbian Insurance Co.*, 37 N. Y. 174; methods of instruction have changed in the last twenty-five years, and one competent to teach then would not necessarily be competent now, *People v. Maxwell*, 87 App. Div. 391, 84 N. Y. S. 947; in February, 1916, the United States was at peace with all the world and had no declared enemies, *Goldstein v. Union Ry. Co.*, 180 App. Div. 417, 167 N. Y. S. 837; Karl Marx was a revolutionary socialist, *Matter of Lithuanian Workers' Literature Society*, 196 App. Div. 262, 187 N. Y. S. 612; in the year 1920 costs were at a peak, *Town of Mamaroneck v. New York Interurban Water Co.*, 126 Misc. 382, 212 N. Y. S. 639.

#### § 49. Census Statistics.

Judicial notice is taken of the census returns, and of the number of inhabitants of a state, county, or city shown thereby, whether the census is made under the authority of the United States or a state. *Trustees of Union College v. City of New York*, 65 App. Div. 553, 73 N. Y. S. 51, aff'd 173 N. Y. 38, 65 N. E. 853. But a court cannot judicially know the population of a town or city at a time subsequent to that shown by the official statistics, even though, as a matter of fact, the population is double that shown by the

official records. *Adams v. Elwood*, 176 N. Y. 106, 68 N. E. 126.

### § 50. Words, Phrases, and Abbreviations.

Courts take judicial notice of the meaning of words, phrases, and abbreviations. They are constantly construing wills, deeds, contracts, and statutes upon their own knowledge of the import of words. In a case frequently cited, *Hoare v. Silverlock*, 12 Q. B. 624, 116 Eng. Rep. 1004, where a libel charged that friends of the plaintiff had "realized the fable of the frozen snake," the court held it would take notice that the knowledge of that fable existed generally in society. In *Turner-Looker Co. v. Aprile*, 195 App. Div. 706, 713, 187 N. Y. S. 367, judicial notice was taken of the meaning of the phrase "sale of whiskey in bond." Notice will be taken that "N. P." and "J. P." after a signature mean Notary Public and Justice of the Peace, and courts will notice the meaning of "A. M.," "P. M.," "C. O. D.," "F. O. B.," and, in determining the ownership of an engine, that "B. & O." means Baltimore and Ohio Railroad Co. *Hedderick v. State*, 101 Ind. 564, 1 N. E. 47; *Ryan v. B. & O. R. R. Co.*, 60 Ill. App. 612; *Paris v. Lewis*, 85 Ill. 597. For other illustrations, see note to *Lanfeur v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, 692. Courts will not take judicial notice of the meaning of a foreign language. *Hossbach v. Behr*, 139 App. Div. 793, 124 N. Y. S. 379.

### § 51. Elasticity of Judicial Notice.

Nothing in the realm of the law is more elastic than the doctrine of judicial notice. With the constantly changing conditions of human life and the endless variety of facts presented to the courts, new applications of the principle are constantly made. The following cases recently decided in the New York courts will serve as illustrations: the construction and operation of freight and passenger elevators, *Losie v. Royal Indemnity Co.*, 183 App. Div. 744,

171 N. Y. S. 174; carpet laying is not a hazardous occupation, *Stradar v. Stern Brothers*, 184 App. Div. 700, 172 N. Y. S. 482; dentist's patients are not placed in the chair for treatment while wearing overcoat or wraps, *Webster v. Lane*, 212 N. Y. S. 298; the usual manner of transferring stock certificates, *Hudson Trust Co. v. American Linseed Co.*, 190 App. Div. 289, 180 N. Y. S. 17; the uses to which streets and highways are put have materially increased with the use of powerful motor vehicles, *Lendrum v. Village of Cobleskill*, 192 App. Div. 828, 183 N. Y. S. 215; a sleigh is not a vehicle on wheels, *Vadney v. United Traction Co.*, 193 App. Div. 329, 184 N. Y. S. 955; gas and electric fixtures often pass with real property and are unlike furniture, pictures, carpets, and hangings, which are easily and customarily removed, *Wahle-Phillips Co. v. Fitzgerald*, 225 N. Y. 137, 121 N. E. 763; the great shortage of housing facilities in New York City in 1920, *Seventy-Eighth St. & Broadway Co. v. Rosenbaum*, 111 Misc. 577, 182 N. Y. S. 505; the provisions of the Standard Fire Insurance policy of New York, *American Surety Co. v. Patriotic Assurance Co.*, 242 N. Y. 54, 150 N. E. 599; the provisions of the Danish Survivorship Annuitants' Table of Mortality, *Pelitinelli v. Degnon Contracting Co.*, 218 App. Div. 7, 217 N. Y. S. 679; the mechanical means by which a voter records his choice of candidates on a voting machine, *Application of Robinton*, 128 Misc. 163, 218 N. Y. S. 3.

## § 52. Things Not Judicially Noticed.

Among matters not judicially noticed are: notes issued by the defunct government in Russia are backed by the credit of a responsible government or that they can pass anywhere as money, *Reisfeld v. Jacobs*, 107 Misc. 1, 176 N. Y. S. 223; X-Ray apparatus is available and in use in the Barbadoes and South American ports, *Leone v. Booth Steamship Co., Ltd.*, 189 App. Div. 185, 178 N. Y. S. 620; of church law of a particular denomination, *Rector, Churchwardens and Vestrymen of Christ's Church at Pelham v. Collett*, 208 App. Div. 695, 204 N. Y. S. 315; of the slang

expression "threw" as in "threw a roulette game," Boyle v. MacDougall, 128 Misc. 225, 218 N. Y. S. 285. The courts have further announced that judicial notice may not commonly be used to aid pleading or as a mode of bringing controversies into court or stating them, Levy v. Delaware, Lackawanna & Western Railroad Co., 211 App. Div. 503, 207 N. Y. S. 592.



## CHAPTER II.

### PRESUMPTIONS

#### § 53. Presumption Defined.

"A presumption may be defined to be an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection." For discussion of meaning and use of presumptions, see 11 Cornell Law Quarterly, p. 20.

#### § 54. Classification of Presumptions.

Many treatises on law divide presumptions into two classes, presumptions of law and presumptions of fact. A presumption of fact is nothing more or less than an inference which may be drawn by the jury, based on circumstantial evidence, and has nothing to do with the subject of legal presumptions, which are definite rules of law. We are concerned, therefore, only with presumptions of law, which are the only true presumptions. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 502, 27 Law. Ed. 337, 1 Sup. Ct. Rep. 582; *Platt v. Elias*, 186 N. Y. 374, 79 N. E. 1.

#### § 55. Presumptions of Law—Conclusive and Disputable.

A legal presumption is a rule of law which requires that a certain fact must be inferred by the court from the existence of certain other facts. It is a definite conclusion of law which must invariably be drawn as soon as a given set of facts is established, even though it may be thereafter rebutted by evidence offered in opposition to it. *Platt v. Elias*, 186 N. Y. 374, 79 N. E. 1. Some presumptions of law have been expressly created or declared by statute, while others have been established by judicial decisions and are a part of the common law. Presumptions may be either conclusive or disputable.

### § 56. Conclusive Presumptions.

A conclusive presumption forbids inquiry into the real facts. Thus, by the statute of limitations, a debt, if not kept alive in a certain way, is extinguished after a lapse of six years. One is not permitted to prove that the sum due has never been paid, for there is a conclusive presumption that it has been. Greenleaf on Ev., 16th Ed., sec. 16. At common law instruments under seal were regarded as conclusive evidence of a consideration, but by statute in many states a seal upon an executory instrument is no longer conclusive of a consideration, but only *prima facie* evidence of it. In New York a seal upon an executory instrument is only presumptive evidence of a sufficient consideration which may be rebutted as if the instrument were not sealed. Civil Practice Act, sec. 342. With respect to executed instruments bearing seals, the old common law rule still prevails. For example, a receipt in full under seal conclusively presumes the payment of money. *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692. Infants under seven are conclusively presumed to be incapable of committing crimes. Many authorities prefer to describe these conclusive presumptions as substantive rules of law. Greenleaf on Ev., 16th Ed., sec. 14y; Wigmore on Ev., sec. 2492.

### § 57. Disputable Presumptions.

Disputable or rebuttable presumptions are those presumptions which arise from certain facts which are sufficient to make out a *prima facie* case. Such presumptions continue until overcome by evidence. Thus, a man is presumed innocent until he is proven guilty. This means only that if a man is charged with a crime he is not bound to prove that he did *not*, but his accuser is bound to prove that he *did*, commit it. Greenleaf on Ev., 16th Ed., sec. 34. Disputable presumptions, therefore, arise in all cases where there has been sufficient evidence to make out a *prima facie* case and to throw on the opponent the burden of proving the contrary. It is not necessary, however, to hold that a disputable presumption is wholly destroyed by the evidence

offered in rebuttal. The trial court or jury is entitled to weigh the presumption against the evidence and decide the issue either way as a finding of fact. *Latham v. Sheff*, 193 App. Div. 576, 185 N. Y. S. 278. But where there is a conclusive presumption, the opponent is not permitted to prove the contrary, for the facts in question, explained or unexplained, contradicted or uncontradicted, are, by law, made conclusive. For a complete analysis of the theory of presumptions, see Thayer's Preliminary Treatise on Ev., pp. 313 and 539.

#### VARIOUS PRESUMPTIONS OF LAW

##### § 58. Presumption of Payment by Lapse of Time.

Under the common law rule a presumption of payment arises from lapse of time and this cannot be rebutted merely by proof of non-payment in fact. This rule is based upon convenience and policy. *Martin v. Stoddard*, 127 N. Y. 61, 27 N. E. 285.

"Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome extent. Hence, statutes of limitation have been enacted in all civilized communities, and in cases not within them, prescription or presumption is called in as an auxiliary to the administration of justice. Courts of equity consider it mischievous to encourage claims founded on transactions that took place at a remote period. They, therefore, grant no relief after a great length of time. In a word, the most solemn muniments are presumed to exist in order to support long possession; the most solemn of human obligations lose their binding efficacy and are presumed to be discharged after a lapse of many years." Foulk

v. Brown, 2 Watts (Pa.) 209; Bean v. Tonnele, 94 N. Y. 381, 46 Am. Rep. 153.

In this state various statutes of limitation have been enacted from time to time which have superseded the old common law presumption of payment from lapse of time. Civil Practice Act, Art. 2.

### **§ 59. Presumption of Grant by Adverse Possession.**

Where one has been in adverse possession for a period of twenty years, there is a conclusive presumption of a grant. The grant is presumed on principles of public policy, and not from any belief that a deed has actually been executed. Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387; Belotti v. Bickhardt, 228 N. Y. 296, 127 N. E. 239; Civil Practice Act, sec. 35.

### **§ 60. Presumption That One Intends the Natural Consequences of His Acts.**

A sane man is presumed to intend the probable consequences of his own act, but this presumption is rebuttable. A mistake or inadvertence may be shown. Roberts & Co. v. Buckley, 145 N. Y. 215, 39 N. E. 966. Illustrations: One who knowingly utters a forged note is presumed to intend to defraud; one who willfully sets fire to another's house intends to destroy the property; and again, one who voluntarily does an act tending to destroy another's life is presumed to have intended to destroy it.

### **§ 61. Same—Murder.**

By statute in New York (Penal Law, sec. 1044) the old common law rule that the use of a deadly weapon raises a conclusive presumption of intent to murder has been entirely abolished. To convict a defendant of murder in the first degree under our statute, the prosecution must show affirmatively, before he rests, that defendant intentionally killed the deceased with premeditation and deliberation. The jury is at liberty to infer the criminal intent and the

facts of deliberation and premeditation from any of the facts in evidence, but there is no presumption of law arising from the homicide which will assist the prosecution or take the place of any of the evidence required to establish all of the essential elements of the crime. *Stokes v. People*, 53 N. Y. 164, 177 et seq., 13 Am. Rep. 492; *People v. Fish*, 125 N. Y. 136, 146, 26 N. E. 319, 321.

**§ 62. Civil Action—Presumption of Malice in Libel and Slander.**

In an action for libel or slander, if the utterance is proved to be both false and injurious to the person concerning whom it was published, and no justifiable motive for making it is apparent, malice is conclusively presumed. But where a publication which would otherwise be libelous is held to be a privileged communication, the question of actual malice is for the jury. *Lewis v. Chapman*, 16 N. Y. 369, 372; *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662.

**§ 63. Presumption of Knowledge of the Law.**

There is a presumption that everyone knows the law. This presumption extends even to a situation such as the Court describes in *Holland v. Atlantic Stevedoring Co.*, 210 App. Div. 129, 205 N. Y. S. 397, where it says: "A statute which is ultimately declared unconstitutional is presumed to have been known by all to be a nullity from the time of its enactment, even though the fact of its nullity is not known until declared a long time afterwards by a five to four decision."

**§ 64. Presumption as to Regularity.**

Mr. Stephens states the rule thus: "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with." *Stephens on Ev.*, Art. 101. As stated by the Court in *Matter of Marcellus*, 165 N. Y.



70, 77, 58 N. E. 796, "The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done." See, also, 22 C. J., p. 128-143; *Matter of Whitman*, 225 N. Y. 1, 9, 121 N. E. 479. This presumption is rebuttable by affirmative evidence of irregularity but the burden of producing such evidence rests upon him who asserts unlawful or irregular conduct. 22 C. J., p. 135; *Culp v. City of New York*, 146 App. Div. 326, 130 N. Y. S. 705; *United States v. Chemical Foundation*, 272 U. S. 1, 71 Law. Ed. 131, 47 Sup. Ct. Rep. 1.

### **§ 65. Presumption as to Jurisdiction of Courts.**

The presumption is that a court of general jurisdiction, whether of our own or a sister state, proceeded to judgment only after duly acquiring jurisdiction both of the subject matter and the parties, and that it acted in accordance with the rules of practice governing it, and did not act until every prerequisite required by the law had been complied with. This presumption is not allowed to contradict the record and can arise only with respect to jurisdictional facts concerning which the record discloses nothing and no evidence is offered. When it affirmatively appears that any essential step was omitted the presumption in favor of jurisdiction is destroyed. It should be noted that there is no such presumption with respect to inferior courts of limited jurisdiction. *Smith v. Central Trust Co.*, 154 N. Y. 333, 48 N. E. 553; *Steinhard v. Baker*, 163 N. Y. 410, 57 N. E. 629.

### **§ 66. Presumption as to Genuineness of Ancient Instruments.**

Under certain conditions no proof of the execution of ancient documents is required. Age, appearance, and custody are the elemental circumstances of an ancient document. After a period of thirty years they are said to prove themselves. The reason for the rule is that after a long lapse of time, testimonial evidence is unavailable, the presumption being that the witnesses are dead, and the rule is

unaffected, even though the witnesses are living. But the age of the document, standing alone, is insufficient, while age, together with an unsuspicious appearance and possession by a natural custodian, is sufficient. Greenleaf on Ev., 16th Ed., sec. 21; Wigmore on Ev., secs. 2139 and 2140. "The mere fact that the instrument has existed for more than thirty years, unaided by other proofs, cannot be enough to establish it in a court of justice . . . Showing that the instrument is thirty years old has no greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence, whether the time be long or short, has no tendency whatever, in a legal point of view, to prove the due execution of the instrument . . . Indeed, when nothing has ever been done (by way of possession) under the deed, the lapse of time tends to discredit it. Courts have not relaxed the rules of evidence in relation to ancient deeds because time alone furnishes any presumption in their favor, but because the lapse of time renders it difficult, and sometimes impossible, to give the usual proof of execution." Wigmore on Ev., sec. 2137. Where the deed (ancient document) is for land, there is much controversy over the question as to whether a party is bound to show an occupation of the land since the time of the date represented by the document. See Wigmore on Ev., sec. 2141, note p. 2906.

The rule which has been most frequently followed in New York is stated by the Court, in *Clark v. Owens*, 18 N. Y. 434, as follows: "In England, if the deed appears to have been in existence for thirty years, and during that time to have been in the proper custody, it is held to be admissible without further proof. In this state, however, something more has been generally required. There must be not only direct proof or evidence warranting the inference that the deed has been in existence for thirty years, but something in addition, tending to establish the authenticity of the instrument. If possession has accompanied the deed for that length of time that is enough. If not, other circumstances may be resorted to for the purpose of raising the necessary

presumption in favor of the deed." See, also, Civil Practice Act, sec. 35. Another New York Court has tersely stated the rule in this manner: "This rule is that a record or document which has been found to be more than thirty years of age, and which is proven to have come from proper custody, and is itself free from any indication of fraud or invalidity proves itself." *Fairchild v. Union Ferry Co.*, 121 Misc. 513, 201 N. Y. S. 295. The genuineness of the execution of the document, arising from the circumstances of age, appearance, and custody, and, in grants of land, the additional circumstance of possession, applies alike to all kinds of instruments, *i. e.*, wills, letters, records, contracts, maps, certificates and other writings requiring authentication. *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. 107; *Coleman v. Bruch*, 132 App. Div. 716, 117 N. Y. S. 582; *Matter of Barney*, 185 App. Div. 782, 174 N. Y. S. 242.

#### **§ 67. Presumption as to Incapacity.**

It is a conclusive presumption of law that an infant under seven years of age is incapable of committing a crime. Penal Law, sec. 816. A person over seven and under twelve (at common law fourteen) years, is presumed incapable of committing a crime, but this presumption is rebuttable by proof that he knew right from wrong. Penal Law, sec. 817; *People v. Domenico*, 45 Misc. 309, 92 N. Y. S. 390. At common law males under fourteen and females under twelve years were conclusively presumed incapable of consent to the marriage contract. This is now regulated by statute in the United States. In New York the legal age of consent is eighteen years for both males and females. Dom. Rel. Law, Art. 2, sec. 7.

#### **§ 68. Presumption as to Marriage.**

Where a marriage ceremony is shown to have been performed, it is presumed to have been properly and legally performed. This theory is based upon the presumption in favor of the regularity of official and other lawful acts. The procuring of a license and the consent of parents, when es-

sential to the validity of a marriage, are presumed. Where persons live and cohabit as husband and wife, and are reputed to be such, a presumption that they have been married arises, and this presumption, especially in a case involving legitimacy, can be repelled only by the most cogent and satisfactory evidence. *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Smith v. Smith*, 194 App. Div. 543, 185 N. Y. S. 558; *In re Goode's Estate*, 188 N. Y. S. 188.

### **§ 69. Presumption of Marriage in Civil and Criminal Actions.**

For obvious reasons a much stricter rule prevails in criminal than in civil actions. Thus, if in a criminal case proof of a marriage would show the defendant guilty of a crime, *viz.*, bigamy, adultery, etc., there must be direct proof of marriage. The theory is that the presumption of marriage, arising from cohabitation, declarations of the parties and repute of the marriage, is counterbalanced, or at least neutralized, by the presumption of innocence. *Clayton v. Wardell*, 4 N. Y. 230; *Palmer v. Palmer*, 162 N. Y. 130, 56 N. E. 501.

### **§ 70. Presumption of Legitimacy.**

The law presumes that every child is legitimate. In *Starr v. Peck*, 1 Hill (N. Y.) 270, 272, the Court said: "To this may be added the presumption that the parties would not indulge in a connection which was immoral, not to say criminal. We are to presume against a notorious act of immorality almost as strongly as we would against the commission of a legal crime." In *Hynes v. McDermott*, 91 N. Y. 451, 459, we find the Court expressing itself thus: "The law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy." And Wharton on Evidence (sec. 1298) says, "That a person, born in a civilized nation, is legitimate, is a presumption of law, to be binding until rebutted." *Matter of Matthews*, 153 N. Y. 443, 47 N. E. 901; *Matter of Biersack*, 96 Misc. 161, 159 N. Y. S. 519, *aff'd* 179 App. Div. 916, 165 N. Y. S. 1077.



"But where the husband and wife cohabited, as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity." Greenleaf on Ev., 16th Ed., sec. 28. Neither husband nor wife is allowed to deny sexual intercourse. Testimony of either party even tending to show non-intercourse should be excluded. This rule is based upon the broad ground of public policy, and the rule obtains whatever the form of the legal proceedings may be. *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Matter of Barthel*, 111 Misc. 727, 177 N. Y. S. 565. The strictness of the old rule, which still prevails in New York, has been relaxed in many jurisdictions. See *Pennsylvania Law Review*, January, 1927.

#### **§ 71. Presumption of Intestacy.**

Death being established carries with it a presumption of intestacy. *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 324; *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. 10; *Rodgers v. Rodgers*, 186 App. Div. 77, 174 N. Y. S. 24.

#### **§ 72. Presumption of Solvency.**

Solvency is presumed until the contrary is shown. "A debt being proved the presumption is that it is collectible as solvency, and not the contrary is to be presumed." *O'Conner v. Gifford*, 117 N. Y. 275, 279, 22 N. E. 1036.

#### **§ 73. Presumption as to Husband's Coercion.**

The old common law rule is that acts of a criminal nature committed by the wife in the presence of her husband are presumed to be compelled by him, except in treason, murder, and robbery. This presumption is rebuttable. *Goldstein v. People*, 82 N. Y. 231; *Seiler v. People*, 77 N. Y. 411; *People v. Ryland*, 97 N. Y. 127. The Penal Law, sec. 1092, provides that "It is not a defense to married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband." This section merely



removes from the prosecution the burden of overcoming the presumption of coercion in favor of the defendant. She may still show coercion.

**§ 74. Presumption of Survivorship in Common Disaster.**

By the civil law, when two or more persons perished in the same calamity, those who by reason of age, sex, or state of health were deemed best able to struggle for life, were presumed to have been the survivors. At common law no such presumption has ever prevailed. In *St. John v. Andrews Institute*, 117 App. Div. 698, 102 N. Y. S. 808, the Appellate Division stated the law of New York as follows:

“At common law there is no presumption of survivorship between persons who perish in a common disaster based upon a difference of sex, age or physical condition or strength, nor is there a presumption the death of all occurred at the same instant. Yet, through necessity in the administration of the law, the title to real and personal property passes as if they had all perished at the same instant of time, in the absence of facts or circumstances tending to show survivorship among them. Therefore, when it appears that a testator, his wife and a legatee all perished in a fire which consumed a dwelling house, the burden is upon the administrator of the legatee in order to entitle him to receive the legacy to prove facts and circumstances tending to show that she survived the testator. But under such circumstances, there being no presumption of death at the same time, there is no burden upon the administrator to overcome any presumption, but merely to prove the fact of survivorship, as any other fact is required to be proved. Neither is it necessary to show that the deceased survived the testator for any great length of time; survival for a second is sufficient.”

The Court, on an analysis of the evidence, held that there was sufficient to support a finding of fact that the legatee in question had survived the testator and his wife, no serious attempt having been made to establish survivorship as between the testator and his wife. The Court of Appeals

in *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981, adopted the results found by the lower court. See, also, *Newell v. Nichols*, 75 N. Y. 78, *Richardson's Cases in Evidence*, p. 24; *McGowin v. Menken*, 223 N. Y. 509, 119 N. E. 877, 5 A. L. R. 794. *Contra*, in *California, Grand Lodge, A. O. U. W. v. Miller*, 8 Cal. App. 25, 96 Pac. 22. In this case it appeared that a man and his wife, who were sleeping in the same bed, perished in the California earthquake of April 18, 1906. There was no direct evidence of actual survivorship, so the court discussed the circumstantial evidence, arriving at the conclusion that there was nothing to show which one survived the other. The civil law presumption, which is statutory in California, was therefore effectuated, it being held the husband survived. The distribution of a beneficial life insurance policy was made to turn upon the husband's survivorship.

### § 75. Presumption of Innocence.

The presumption of law in favor of the innocence of one who is accused of having committed a crime is universally recognized. In a criminal action this means simply that the burden is always on the prosecution to establish the guilt of the accused. The defendant is entitled to rest upon the presumption of innocence in his favor until this presumption is so far outweighed by the evidence offered by the prosecution that the jury is convinced of his guilt beyond a reasonable doubt. *People v. Waldo*, 161 App. Div. 731, 146 N. Y. S. 581; *Kurz v. Doerr*, 180 N. Y. 88, 72 N. E. 926. The presumption of innocence is not indulged in a civil action, as the plaintiff rests only under the burden of proving his case by a preponderance of evidence. *Copley Cement Mfg. Co. v. Loeb*, 124 Misc. 640, 207 N. Y. S. 659, *aff'd* 215 App. Div. 805, 213 N. Y. S. 784. In *Kurz v. Doerr*, *supra*, the Court said, "We deem it very important that the strict rule of evidence, applicable to the burden of proof in criminal cases, should not be extended to civil action for the recovery of damages where the defendant is charged incidentally with arson, embezzlement, or any other crime."

The presumption of innocence, however, is not to be confused with that of the good character of a defendant, for there is no presumption as to either good or bad character. *People v. Lingley*, 207 N. Y. 396, 101 N. E. 170. For a most learned discussion of the presumption of innocence, see Thayer's Preliminary Treatise on Ev., Appendix B, p. 551.

### § 76. Presumption of Ownership from Possession.

Where one is in possession of property, such possession is presumed to be rightful. But this presumption is true only when the character of the possession is wholly unexplained. The rule is based upon the theory that rightful owners of property are not likely to consent that their property remain in the continued possession of others, unless authorized by some grant or license.

The following expression of the law in the case of *Rawley v. Brown*, 71 N. Y. 85, has been frequently quoted with approval by the courts of this state: "Possession of property alone and without explanation is evidence of ownership; but is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having the possession, no presumption of ownership arises solely from such possession." *Matter of Duffy*, 127 App. Div. 74, 111 N. Y. S. 77. Even bare possession has been sufficient to maintain an action of trespass against a stranger or wrongdoer. *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141. The presumption is further well illustrated by a familiar English case: A chimney sweeper's boy, having found a jewel, carried it to a goldsmith to ascertain its value; but the goldsmith, by his apprentice, detained it and refused to restore it. The boy having brought trover, it was held that his possession was some evidence of property, good against anyone except the true owner; that he could maintain trover for it on such *prima facie* proof of title, and that refusal to restore it on demand

was evidence of conversion. The presumption arising from possession may be easily rebutted and affords no protection to one who purchases property from one who is not the real owner. *Velsian v. Lewis*, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

**§ 77. Presumption of Guilt from Possession of Fruits of Crime.**

The statement of the law on this subject in *Greenleaf on Ev.*, 16 Ed., p. 129, has been quoted with approval by the Court of Appeals.

"Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and, if unexplained either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise," it is sufficient to warrant a conviction by the jury. "This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present, and concerned in the offense. The like presumption is raised in the case of murder, accompanied by robbery." *Knickerbocker v. People*, 43 N. Y. 177, *Richardson's Cases in Evidence*, p. 32; *People v. Jackson*, 182 N. Y. 66, 74 N. E. 565.

A clear and able discussion of this presumption is found in the case of *People v. Galbo*, 218 N. Y. 283, 112 N. E. 1041, *Richardson's Cases in Evidence*, p. 137. Mr. Justice Cardozo points out that, while it is unquestionably the law that possession of the fruits of a recent crime is presumed to be guilty possession, the degree of guilt may remain uncertain. In other words, a person in possession of recently stolen property may be the thief or merely guilty of receiving stolen property from the thief, or, as in the instant case, one who conceals the body of a victim may be the murderer or merely an accessory after the fact who is



aiding the murderer in concealing the crime. The true inference is one of fact to be drawn by the jury in the light of all of the circumstances of the case.

### § 78. Presumption of Continuance.

Proof of the existence of a person, an object, a condition, or tendency at a given time raises a presumption that it continued for as long as is usual with things of that nature. *MacRae v. Chelsea Fibre Mills*, 145 App. Div. 588, 130 N. Y. S. 339; *Matter of Huss*, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620. In *Wilkins v. Earle*, 44 N. Y. 172, 192, 4 Am. Rep. 655, the Court used the following language: "There is a legal presumption of continuance. A partnership once established is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence." *Matter of Prentice*, 110 Misc. 456, 181 N. Y. S. 679; *Matter of Brown*, 116 Misc. 483, 190 N. Y. S. 184. Our courts have even gone so far as to hold that a man who has not been heard from for fourteen years and who was unmarried when last heard from, is presumed to have remained a bachelor. *Karstens v. Karstens*, 29 App. Div. 229, 51 N. Y. S. 795. But the presumption does not "flow backward"; that is, a state of facts which is proved to exist is not presumed to have existed at any previous time. *Hanna v. Stedman*, 230 N. Y. 326, 130 N. E. 566; *Méhoff-Schultze Grocer Co. v. Gross*, 205 App. Div. 67, 199 N. Y. S. 196.

There is, however, no such presumption of continuance in will cases even though it is shown that a will was once made. "No testamentary papers having been found after a careful search the presumption arises that the decedent herself destroyed the will *animo revocandi*. *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442, *Richardson's Cases in Evidence*, p. 533; *Matter of Staiger*, 243 N. Y. 468, 154 N. E. 312.



### § 79. Presumption of Death After Seven Years' Absence.

A statement of this presumption is found in the opinion of the Court in *Butler v. Mutual Life Ins. Co.*, 225 N. Y. 197, 121 N. E. 758. "The law contains the general presumption that a person who has been continuously absent from his home or place of residence, and unheard from or of by those who, if he had been alive, would naturally have heard of him, through the period of seven years, is dead. The presumption does not arise, however, when there exist circumstances or facts which reasonably account for his not being heard of, or his absence and abstention from communication are reasonably explained without assuming his death, or where diligent inquiry as to whether he is alive or dead has not been made." See *Sears v. Grand Lodge A. O. U. W.*, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204; *Cerf v. Dierner*, 210 N. Y. 156, 104 N. E. 126. The presumption is an arbitrary one, rendered necessary upon grounds of public policy, in order that rights depending upon the life of one long absent and unheard of might be settled. See statutory provisions, Civil Practice Act, sec. 341; Penal Law, sec. 341. There seems to be a conflict in the courts of this state as to whether there is any presumption with respect to the particular time at which death occurred. See *Connor v. New York Life Ins. Co.*, 179 App. Div. 596, 166 N. Y. S. 985, and cases there cited; L. R. A. 1915B 756, note. In *Connor v. New York Life Ins. Co.*, *supra*, the Court attempted to reconcile the conflicting rules laid down in the earlier decisions and stated the law of this state at the present time to be as follows:

"The general rule may now be stated to be that seven years' absence creates a presumption that death took place at the end of that period. But we think that reason and probability require that the rule be modified, so that, if seven years' absence follows a catastrophe, occurrence or hazard whereby the absent one was subjected to peril of his life of such a character that the evidence of his death might be destroyed with death itself, as, for instance, death in a conflagration, or by drowning, the inference of fact may be

drawn that the death occurred at the time of such peril. The presumption that the death occurred at the end of the seven years obtains only by the necessity of the case, in the absence of evidence indicating death at another time. When there is such evidence, the necessity for presuming that death occurred at the end of that period no longer exists."

**§ 80. Statutory Presumption of Death in Real Property Cases.**

The procedure outlined by the statutes of New York for the benefit of one who has an estate after the death of another who has a prior estate therein, provides for a petition for the production of the person whose life is in question, and for the appointment of a referee and a report of such referee as to whether such person is alive or dead. If the person upon whose life the prior estate depends is not produced, or adequate proof given that he is living, he is presumed to be dead for the purposes of the proceeding. This presumption is, however, rebuttable, and the question may be reopened by a similar proceeding at any time that the person presumed dead is actually alive. Real Property Law, secs. 570 to 578.

**§ 81. Presumption Arising from Spoliation and Fabrication of Evidence.**

The act of intentionally destroying or fabricating evidence has always been regarded with suspicion. It is a circumstance indicating a weak cause. One's conduct in thus destroying evidence is attributed to a belief that the truth would have operated against him. *Armour v. Gaffey*, 30 App. Div. 121, 51 N. Y. S. 846, aff'd 165 N. Y. 630, 59 N. E. 1118. As stated in a recent Appellate Division case:

"It is well settled that the deliberate destruction of written evidence gives rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator. This unfavorable presumption will not dispense with the necessity of the other party introducing some other evidence of

its contents, that it may appear that the documents destroyed were in fact relevant to the case. The presumption does not arise from the mere destruction of documents. It must appear that the documents were written evidence relevant to the issues, or at least the documents should by notice be required to be produced upon the trial." *Matter of Eno*, 196 App. Div. 131, 163, 187 N. Y. S. 756. The mere non-production of books, papers, etc., upon notice, has no other effect than to give the other party authority to prove their contents by secondary evidence. For illustrations in general, see 34 L. R. A. 581, note. From a refusal to obey an order to produce books, a presumption arises that the books if produced would furnish evidence material to the case, but no presumption arises that the books and papers are in existence. *Feingold v. Walworth Bros.*, 238 N. Y. 446, 144 N. E. 675.

### § 82. Presumption Arising from Withholding Evidence.

The mere withholding of or failure to produce evidence, which, under certain circumstances, would be expected to be produced, and which is available, may give rise to a presumption against the party. It is a natural inference that the evidence is held back because it would be unfavorable.

In *Reehil v. Fraas*, 129 App. Div. 563, 114 N. Y. S. 17 (reversed on other grounds, 197 N. Y. 64, 90 N. E. 340), the Court states the inferences to be drawn from a failure to produce evidence under various circumstances, as follows:

"First: Failure of a party to produce evidence which would conclusively determine the fact in dispute may give rise to a conclusive inference, *i. e.*, to a presumption of law, that the fact is not as he claims or as is claimed by the other side, as where a party fails to produce a chattel or a writing which is in his possession and would, if produced, show the fact indisputably.

"Second: But in the case of a failure to produce mere oral evidence, the rule necessarily falls short of this, for

oral evidence is not indisputable and conclusive, but depends on slippery memory and honesty. The rule in respect of a failure of a party to produce oral evidence is that such failure is a fact to be considered in determining how much weight, if any, should be given to the evidence which he has produced.

“Third: The question is one of inference for the jury or for the trial Judge, if there be no jury; *i. e.*, it is not an inference or presumption of law, but one of fact; and its degrees are infinite, from slight to very strong or irresistible. It does not grow out of any duty on the part of litigants in respect of calling witnesses or of testifying themselves.”

An excellent discussion of this presumption is found in the recent case of *Perlman v. Shanck*, 192 App. Div. 179, 182 N. Y. S. 767. See, also, 22 C. J., p. 111-123; *Spitzer v. Born, Inc.*, 194 App. Div. 739, 185 N. Y. S. 875.

But a jury is not entitled to draw any such inference from the failure of a party to call as a witness one who, by reason of relationship or employment, is not within his control, or one of whom the other party had the same opportunity of calling, or one who, on account of his situation or relation, would be likely to be hostile. *Vollmer v. Automobile Fire Ins. Co.*, 207 App. Div. 67, 202 N. Y. S. 374. The recent case of *Hayden v. New York Railways Co.*, 233 N. Y. 34, 134 N. E. 826, is in point. The action was for damages sustained as the result of a collision between a taxicab, in which the plaintiff was riding, and defendant's car. The sole question before the Court of Appeals was as to the correctness of the charge of the trial court in connection with plaintiff's failure to call the driver of the taxicab as a witness, although the man was present in the court room during the trial. The Court of Appeals held that the jury was not entitled to draw any inference adverse to the plaintiff by reason of his failure to call this witness, because the man was, in a legal sense, a stranger to the plaintiff and was equally available to the defendant; and that a charge which led the jury to understand that it might draw an inference



adverse to the plaintiff from his failure to call this witness constituted reversible error.

In the case of *Costigan v. Third Ave. R. R. Co.*, 124 Misc. 165, 207 N. Y. S. 216, the Court, referring to an instruction to the jury concerning circumstances under which an unfavorable inference might be drawn, said: "Such an instruction would only be justified where a witness has not been called, although under the control of and available to the plaintiff, who had either a peculiar or superior knowledge of the facts involved in the controversy." In this case, however, the court held that the instruction should not have been given, as the plaintiff actually called the witnesses whose absence was made the basis of the instruction, but called the witnesses at an improper time during the procedure of the trial. They were offered in rebuttal and the court, on objection of defendant's counsel, refused to permit the witnesses to testify. No presumption could be drawn from these facts.

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**§ 83. Presumption That Documents Have Been Duly Executed.**

There is a presumption in favor of the due execution of formal instruments. *Matter of Schweigert*, 17 Misc. 186, 40 N. Y. S. 979. Thus, it will be presumed that the maker's signature was annexed before that of the witness, and that the document was witnessed at the time of its execution. So, too, the date of signing is presumed to be the date of the document; so, also, the date of delivery. Since the mark of finality is the delivery of the deed, its formal execution and retention by the grantor are insufficient to pass title to the grantee, and no delivery to the grantee could therefore be presumed from these facts. But the recording of a deed raises a presumption that it was recorded by the grantee and is, thus, presumptive evidence of delivery. *Sweetland v. Buell*, 164 N. Y. 541, 552, 58 N. E. 663, 79 Am. St. Rep. 676; *Ford v. Gale*, 155 App. Div. 675, 140 N. Y. S. 541.



**§ 84. Presumption of Regularity in Will Cases.**

“Proof of the signature of a deceased subscribing witness is presumptive evidence of the truth of everything appearing on the face of the instrument relating to its execution, as it is presumed the witness would not have subscribed his name in attestation of that which did not take place.” *Matter of Hesdra*, 119 N. Y. 615, 23 N. E. 555; *Matter of Eyett*, 124 Misc. 523, 209 N. Y. S. 251. See, also, Surrogate’s Court Act, sec. 142, providing for proof where all subscribing witnesses to the will are dead or incompetent.

**§ 85. Presumptions Arising in Course of Business.**

Presumptions, founded upon experience, frequently arise in the course of business, public and private. Thus, a letter deposited in the post office, properly stamped and addressed, will be presumed to have been received in due course of the mail, and the post mark on a letter is *prima facie* evidence that the letter was in the post office at the time and place thus designated. The presumption is based upon the fact that the post office is a public agency, charged with the duty of transmitting letters, and that what ordinarily results from the transmission of a letter through the post office resulted in the given case. *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *Diehl v. Becker* 227 N. Y. 318, 125 N. E. 533. Furthermore, where the question is whether a letter was sent by mail at a certain time, in the absence of any evidence as to its being deposited with the post office authorities, proof of a course of business, or of office practice, according to which it naturally would have been mailed, gives rise to a presumption that the letter had in fact been mailed. It is necessary to show, however, that the letter in question was placed in the usual office receptacle for outgoing mail and, in addition, to call as a witness the particular clerk whose duty it was to mail such letters and have him testify that he invariably mailed all letters found in the said receptacle. No less than this amount of evidence as to the office practice is deemed sufficient to justify the submission of the question of the mailing to the jury. *Gardam & Son v.*

Batterson, 198 N. Y. 175, 91 N. E. 371; *Elmore v. Busseno*, 175 App. Div. 233, 161 N. Y. S. 533. See *Federal Asbestos Co. v. Zimmerman*, 171 Wis. 594, 177 N. W. 881, for an excellent review of the authorities on proof of mailing letters. The delivery of a telegram to the addressee is presumed upon proof of its delivery to the telegraph company properly addressed. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485. But this presumption is not applicable to a case where the telegraph company is seeking to recover the amount of its charges for sending the telegrams in question. *Commercial Cable Co. v. Bauer Co.*, 102 Misc. 699, 169 N. Y. S. 450. See opinion on former trial, 100 Misc. 663, 165 N. Y. S. 399. Other presumptions which arise in the course of business are: Those engaged in a particular trade or business are acquainted with the general custom and usages of the business, *Cassin v. Stillman, Delehanty-Ferris Co.*, 185 App. Div. 63, 172 N. Y. S. 754; a draft in possession of a drawee or a note in the possession of the maker has been paid and the obligation discharged, *Neg. Inst. Law*, sec. 200, sub. 5; in the absence of an agreement as to time of payment for goods sold, they are to be paid for on delivery, *Pers. Prop. Law*, sec. 123; contracts, silent as to time of performance, are to be performed within a reasonable length of time, *Wimpie Elec. Co. v. Columbus Circle Const. Corp.*, 98 Misc. 242, 162 N. Y. S. 969.

### § 86. Presumption of Consideration.

There is no presumption of consideration in an action on a non-negotiable note. *Deyo v. Thompson*, 53 App. Div. 9, 65 N. Y. S. 459. Every negotiable instrument, however, is presumed to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party for value. As to all persons except a holder in due course, this presumption may be rebutted. *Neg. Inst. Law*, secs. 50 and 54. Every holder is deemed *prima facie* a holder in due course until it is shown that the title of any person who negotiated the instrument was defective. Such defect will not aid one who became

liable to the instrument before the acquisition of defective title. This presumption also may be rebutted.

**§ 87. Presumptions on the Delivery of a Note, Check, or Draft.**

"It is conceded and it is undoubtedly the general rule, that in the absence of explanation the presumption arising from the delivery of a check is that it was delivered in payment of a debt and not as a loan." *Nay v. Curley*, 113 N. Y. 575, 21 N. E. 698.

Where there is a debt, whether it be pre-existing or concurrent with the giving of a note, the law presumes that the note of the debtor is, in the absence of an agreement, a conditional and not an absolute payment. *Winsted Bank v. Webb*, 39 N. Y. 325, 100 Am. Dec. 435; *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803, 99 N. Y. S. 398. The same applies to checks. A minority of states hold the contrary if the instrument be negotiable. In the absence of an agreement the acceptance of a note, check, or draft of a third person by the creditor from his debtors is not presumed to be in payment of an antecedent debt, but is presumed to be in payment of an indebtedness contracted at the time of the transfer. *Noel v. Murray*, 13 N. Y. 167; *Dillie v. White*, 132 Iowa 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510 and note. See *Richardson*, *Outline of Contracts*, secs. 426, 427, 428.

**§ 88. Presumption of Sanity.**

Sanity is the normal condition of man. Therefore, every man is presumed to be sane until the contrary is shown. *Matter of Langdon*, 173 App. Div. 737, 160 N. Y. S. 3.

**§ 89. Presumption of Sanity of Grantor.**

Deeds, duly executed, are *prima facie* valid. The sanity of the grantor is presumed. *Jones v. Jones*, 137 N. Y. 610, 33 N. E. 479.

### § 90. Presumption of Sanity—Suicide.

The presumption of sanity is not overcome by the act of committing suicide, for "human experience has shown that sane men have taken their own lives." *Wallace v. United Order of Golden Cross*, 118 Me. 184, 106 Atl. 713. The onus is upon the one alleging insanity. Thus, where an insurance policy provides it shall be null and void in case the insured dies by his own hand, and the insured commits suicide, the burden is upon the party seeking to enforce the policy to prove that the act of self-destruction was that of an insane person. *Weed v. Mutual Benefit Life Ins. Co.*, 70 N. Y. 561; cases collected in note to 59 Am. Dec. 487, 496. But where the facts are as consistent with death by accident or homicide as by suicide, the presumption is against suicide. *Mallory v. Trav. Ins. Co.*, 47 N. Y. 52; *White v. Prudential Ins. Co.*, 120 App. Div. 260, 105 N. Y. S. 87. While it is true that there is a presumption that one does not take his own life, this rule has usually been applied in life insurance and accident cases. It has never been applied in a capital case. *People v. Creasy*, 236 N. Y. 205, 140 N. E. 563.

### § 91. Presumption of Sanity—Criminal Cases.

The normal condition of man being sanity, the law presumes sanity, and this presumption prevails in criminal as well as civil cases. But in criminal cases, where insanity is put in issue by the defendant, the prosecution must prove sanity, for the affirmative of the issue rests upon the plaintiff. Defendant's evidence of insanity rebuts the legal presumption of sanity, and the prosecution must then prove sanity as a part of its case.

If the defendant's evidence raises a reasonable doubt as to his sanity, there is a reasonable doubt as to his guilt, and unless and until the doubt is removed, the defendant must be deemed not guilty, for an insane person is not responsible for his acts. *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730. See, also, *People v. Egnor*, 175 N. Y. 419, 67 N. E. 906.



In *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, Chief Justice Cooley says: "They (the prosecution) are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. But, when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it, with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt."

**§ 92. Presumption as to Law of Sister States and Foreign Nations.**

While the New York courts will not take judicial notice of the laws of sister states, there is a presumption that the common law still prevails in all the states in which it is the foundation of their jurisprudence and that it is the same as the common law of New York. *Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 200, 99 N. E. 722; *Boston Dairy Co. v. Jones Corp.*, 72 Misc. 17, 129 N. Y. S. 70.

There is no presumption that the statutory law of a sister state is the same as that of New York. *Venner v. N. Y. C. & H. R. R. R. Co.*, 160 App. Div. 127, 133, 145 N. Y. S. 725, *aff'd* 217 N. Y. 615, 111 N. E. 487.

There is no presumption that the law of a jurisdiction not of common law origin is the same as our common law. *Christie v. Cerro De Pasco Copper Corp.*, 214 App. Div. 820, 211 N. Y. S. 143, *aff'd* 243 N. Y. 557. For some time, and until quite recently, there has been a conflict in our courts as to what rule to apply in a case where the law of a non-common law jurisdiction is not proved as a fact. In *Vazakas v. Vazakas*, 109 N. Y. S. 568, the Court held:

"As we do not know from the evidence what the laws of Greece are, we may presume them to be the same as those of our own state, and that sec. 1743, sub. 4 (now Civil Practice Act, sec. 1139) applies, permitting an action to annul



a marriage, where the consent of one of the parties was obtained by force, duress, or fraud." Another view, that of the Supreme Court of the United States, is recorded in *Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 56 Law. Ed. 274, 32 Sup. Ct. Rep., was adopted in *Liachovitzky v. New York Life Insurance Co.*, 126 Misc. 109, 212 N. Y. S. 722. This position is that courts will, in dealing with rudimentary contracts made or torts committed abroad, such as promises to pay money for goods, services, or battery to a person, or conversion of goods, assume a liability to exist if nothing to the contrary appears. The Court in the *Cuba Railroad Co. v. Crosby* case, *supra*, said: "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action at that place." The recent case of *Riley v. Pierce Oil Corp.*, 245 N. Y. 152, 156 N. E. 647, seems to have settled the question so far as New York is concerned by announcing that where the cause of action arose in a non-common law jurisdiction no presumption may be made as to that foreign law nor may the court apply its own law. If the law of the non-common law jurisdiction be not proved as a fact, the action must fail. This is especially important as the theory of the plaintiff's cause was conversion, one of the instances specially mentioned in the case of *Cuba Railroad Co. v. Crosby* as falling within the rule of that case. The Court of Appeals in New York held that the property law of the non-common law jurisdiction was an essential part of any cause of action based on conversion and without proof thereof, no action could be maintained.

### § 93. Presumption of Identity of Person from Identity of Name.

Identity of name, in the absence of all other proof on the subject, raises a presumption of identity of person. *People v. Snyder*, 41 N. Y. 397, 403. A good illustration of the value of this presumption may be found in *Doherty v. Mutual Life Ins. Co.*, 166 N. Y. S. 838. In this case the defendant

claimed that the policy sued on had been avoided by a misrepresentation on the part of the insured in stating that he had never been under treatment in a sanitarium. The defendant proved that "James Doherty" had spent three weeks in a certain sanitarium. Plaintiff did not offer any evidence, and the Court ruled that, since identity of name is *prima facie* evidence of identity of person, the evidence was sufficient to show that the insured had been an inmate of the sanitarium.

This presumption is very much strengthened when there is a similarity of residence or trade or circumstances or where the name is unusual. *Layton v. Kraft*, 111 App. Div. 842, 846, 98 N. Y. S. 72.

#### § 94. *Res Ipsa Loquitur*.

The maxim "*res ipsa loquitur*" means that "the thing speaks for itself." Under certain circumstances a jury may infer negligence from the fact that an injury has occurred. One of the essential conditions permitting the application of the rule is that the injury shall occur under such circumstances as, tested by ordinary experience and observation, fairly create the presumption, in the absence of explanation, that the person sought to be charged has failed to fulfill some obligation which he owed to the person injured, and which, if discharged, would have prevented the accident. Where the agency which caused the plaintiff's injury was exclusively under the control of the defendant and an accident which ordinarily could not occur without negligence, is shown to have occurred, the mere happening of the accident itself may be sufficient to raise a presumption of negligence and to cast upon the defendant the burden of explaining the cause of the accident. To illustrate: A building falls into the street, seriously injuring a passer-by. As buildings properly constructed and kept in repair do not fall without external violence of some kind, the mere fact of the building's collapse raises a presumption of negligence on the part of its owner. *Mullen v. St. John*, 57 N. Y. 567; *Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403.

As stated in the leading case of *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925: "The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which plaintiff is unable to present." See, also, *Goldstein v. Pullman Co.*, 220 N. Y. 549, 116 N. E. 376. But if the injury can be accounted for on any reasonable theory other than that of the defendant's negligence, or if the responsibility for the injury may lie with one of two or more parties so that it is not clear from the mere happening of the accident whose negligence caused it, the doctrine of *res ipsa loquitur* will not be applied. *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805; *Wolf v. Am. Tract Society*, 164 N. Y. 30, 58 N. E. 31; *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661; *Francey v. Rutland R. R. Co.*, 222 N. Y. 482, 119 N. E. 86. But see *Hughes v. Harbor & S. B. & S. Assn.*, 131 App. Div. 185, 115 N. Y. S. 320, for a case where both owner and contractor are liable on any theory of the accident.

Where a passenger is injured as a result of a collision with a car of another company, a *prima facie* case of negligence on the part of the carrier is made out, but this presumption, resting on the duty that the carrier owes to its passenger and the inability of the passenger to account for the collision, is not strictly an application of the doctrine of *res ipsa loquitur*. *Plumb v. Richmond Light & Railroad Co.*, 195 App. Div. 254, 187 N. Y. S. 38.

### § 95. Conflicting Presumptions.

Where there are conflicting presumptions of unequal weight, the stronger will prevail. *Palmer v. Palmer*, 162 N. Y. 130, 56 N. E. 501. This is nowhere better illustrated than in the case of *Fagin v. Fagin*, 88 Misc. 304, 151 N. Y. S. 809. This was an action to annul a marriage on the ground that the wife had a former husband living at the time of her marriage to the plaintiff. Plaintiff proved

that his wife had been previously married in Russia and rested upon the presumption of continuance of life. The Court ruled that this presumption was outweighed by the presumption that the wife was innocent of the crimes of bigamy and adultery, as well as by the strong presumption in favor of the legality of the second marriage, and dismissed the complaint. See, also, *Smith v. Smith*, 194 App. Div. 543, 185 N. Y. S. 558. *Matter of Werlich*, 230 N. Y. 516, 130 N. E. 632. On conflict of presumptions generally, see 16 L. R. A. (N. S.) 103, note. See, also, *State v. Plym*, 43 Minn. 385, 45 N. W. 848, *Richardson's Cases in Evidence*, p. 30.

## CHAPTER III.

### REAL EVIDENCE

#### § 96. Sources of Belief.

There are three modes of producing evidence to enable a tribunal to render judgment. These modes of evidencing a fact are known as

1. Real Evidence.
2. Circumstantial Evidence.
3. Direct Testimony of Witnesses.

#### § 97. Real Evidence Defined.

In addition to testimonial evidence (direct or indirect), the tribunal has a third mode of acquiring information on a matter of fact submitted to it for judicial investigation, *viz.*, the presentation of the object itself to which the testimony refers, for personal observation by the court and jury. Such objects, when it is convenient, are brought into the court room, but occasionally the jury is permitted to go out of the court room for the purpose of inspecting a locality or an object not capable of production in court. Evidence thus acquired, by self-observation, is described as real or demonstrative evidence. This would seem to be the most natural and satisfactory process of proof.

The three methods of producing evidence are well illustrated by Wigmore on Ev., sec. 1150: "If, for example, it is desired to ascertain whether the accused has lost his right hand and wears an iron hook in place of it, one source of belief on the subject would be the testimony of witnesses who had seen the arm; in believing this testimonial evidence, there is an inference from the human assertion to the fact asserted. A second source of belief would be the mark left on some substance grasped or carried by the accused; in believing this circumstantial evidence, there is an inference from the circumstance to the thing producing it. A third source of belief remains, namely, the inspection by the



tribunal of the accused's arm. This source differs from the other two in omitting any step of conscious inference or reasoning, and in proceeding by direct self-perception or autopsy."

In *Warlick v. White*, 76 N. C. 175, 179, the Court uses the following language: "On general principles it would seem that, when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. Why should a jury be confined to hearing what other men think they have seen, and not be allowed to see for themselves?" And, again, where an indictment rested on the ground that the defendant was a colored man, the Court held that no proof of that fact was necessary, as the defendant had been before the jury, that the jury's inspection did away with the necessity of proof, and said, "Juries may use their eyes as well as their ears." *Garvin v. State*, 52 Miss. 207; *Hook v. Pagee*, 2 Munf. (Va.) 379.

This mode of proof may be resorted to in a great variety of instances; for example, to prove the color of hair, the alteration of an instrument, the kind of shoes or clothing worn by the accused, the extent of an injury, the fact that clothes are bloodstained, or the weakness of a piece of iron. *People v. Gonzalez*, 35 N. Y. 49; *King v. N. Y. C. & H. R. R. R. Co.*, 72 N. Y. 607. But the articles exhibited to the jury must be in substantially the same condition as at the time in question. *People v. Flanigan*, 174 N. Y. 356, 368, 66 N. E. 988, 17 N. Y. Crim. Rep. 300.

Occasionally juries are permitted to test the evidence by means of their other senses. To illustrate: The New York Times of January 29, 1921, reported that "A piano, a violin, a trumpet, and a phonograph gave noisy testimony yesterday before Federal Judge Hand in the suit of G. Ricordi & Co. for an injunction restraining J. H. Remick & Co., music publishers, from trafficking in the song '*Avalon*' sung by Al. Jolson. The plaintiffs contend that the music is the same as the music of an aria in the opera, *La Tosca*, the copyright of which they hold." And on January 25, 1922,

the same paper reported that the members of a federal jury were invited to sample a bottle of whiskey.

### § 98. Relevancy.

There are two fundamental principles applicable to all kinds of issues and the whole process of proof, viz.:

(a) No fact not having probative value is admissible;

(b) Every fact having probative value is admissible, except so far as excluded by some specific rule of policy or tradition. Therefore, the object submitted for inspection must be relevant, *i. e.*, must tend to prove or disprove the question at issue. *Smith v. Lehigh Valley R. R. Co.*, 177 N. Y. 379, 69 N. E. 729, *Richardson's Cases in Evidence*, p. 54.

### § 99. Inspection to Determine Age.

It is expressly provided by statute in New York that, "Whenever in any proceeding or trial it becomes necessary to determine the age of a child, such child may be produced and exhibited to enable the court or jury to determine its age by a personal inspection; and such court may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of such age." Civil Practice Act, sec. 334; Penal Law, sec. 817. Contrary to the rule in some other jurisdictions, our courts seem to hold that if the one whose age is in question is present in the court room, the jury may determine his age by inspection, even though the attention of the jury is not particularly called to the person for this purpose. *People v. Kaminsky*, 208 N. Y. 389, 102 N. E. 515; *Union Bank of Brooklyn v. Mandel*, 139 App. Div. 684, 124 N. Y. S. 459.

Although this evidence of age secured by inspection of a complaining witness in a criminal action where the prosecution charges rape in the second degree, affords material evidence against the defendant, such inspection, unaccompanied by other evidence as to age, is insufficient to enable the jury to determine whether the complaining witness was

just over or just under eighteen years. *People v. Marks*, 146 App. Div. 11, 130 N. Y. S. 524.

**§ 100. Inspection to Prove Resemblance.**

There is a sharp conflict in the courts of the various states as to whether it is proper to direct the attention of the jury to two persons who are in court for the purpose of proving resembling features. In some jurisdictions, when the paternity of a child is in issue, juries are permitted to compare the features of the child with those of the alleged father. *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600.

In New York and many other jurisdictions, however, inspection is not permitted for this purpose, for the reason that the subject of human resemblance is largely a matter of fancy and guess work, and this is especially true concerning very young children. *Bilkovic v. Loeb*, 156 App. Div. 719, 141 N. Y. S. 279, *Richardson's Cases in Evidence*, p. 58; *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588, *Richardson's Cases in Evidence*, p. 55.

**§ 101. Privilege against Self-incrimination.**

The usual practice of examining prisoners for marks or bruises, searching their clothing, seizing all articles of an incriminating nature found upon their persons, and producing the same in evidence upon the trial, seems to have been universally upheld against the contention made on behalf of the accused that the privilege of the accused not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the Constitution of the United States and by the Constitution of the State of New York, Art. 1, sec. 6, has thereby been violated. Upon the trial in the case of *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, the defendant was forcibly compelled to stand up in order that he might be identified by a witness. An appeal was taken on the ground that this action on the part of the court violated the prisoner's constitutional rights by compelling him to be a witness against himself. New York Constitution, Art. 1, sec. 6. The Court of Ap-

peals held that the action of the trial court was necessary and proper and that no constitutional right of the defendant had been violated. This decision has never been questioned. It was held in *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299, that the prisoner's shoes might be seized for the purpose of comparing them with foot prints.

**§ 101a. Admission of Evidence Illegally Obtained—New York Rule.**

The use as evidence of books, papers, articles, or other evidential facts which have been illegally obtained or unlawfully seized in violation of the United States Constitution, Fourth Amendment, and Civil Rights Law, sec. 8, which provide against unreasonable search and seizure, will not be prohibited; nor will their use as evidence be denied as a violation of the Federal Constitution, Fifth Amendment, or State Constitution, Art. 1, sec. 6, prohibiting compulsory self-incrimination.

This privilege of the accused not to give evidence against himself is violated, however, when an incriminatory disclosure has been extorted by legal process directed against the accused. This would constitute a "testimonial compulsion." *People v. Adams*, 176 N. Y. 351, 359, 68 N. E. 636; *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, *Richardson's Cases in Evidence*, p. 72. Certainly things outlawed or contraband possessed without right and subject upon seizure to forfeiture or destruction may be offered in evidence without trenching upon the privilege in respect to self incrimination whether the seizure has been made with or without a warrant. Whether an exception will be made to the above rule in a case where the seizure is unwarranted and of things lawfully possessed is a question which the Court has refused to answer until an appropriate case is before it. The strong indications of the opinion, in the case of *People v. Defore*, *supra*, however, are that no exception will be drawn even in case of seizure of things lawfully possessed; and that the privilege in New York is violated only when the papers or articles are secured by aid of legal process.



**§ 101b. Admission of Evidence Illegally Obtained—Federal Rule.**

The federal rule arising under the protection afforded by the Fifth Amendment of the Federal Constitution prohibits the use as evidence of papers or articles unlawfully seized by federal officers or agents. The federal courts hold that their use under such circumstances actually compel the accused to be an "unwilling source of evidence against himself" and, consequently, violates his constitutional privilege. *Weeks v. United States*, 232 U. S. 383, 58 Law. Ed. 652, 34 Sup. Ct. Rep. 341; *Gouled v. United States*, 225 U. S. 298, 306, 65 Law. Ed. 647, 41 Sup. Ct. Rep. 261.

The *Weeks* and *Gouled* cases are important since they modify the rule of exclusion initiated in *Boyd v. United States*, 116 U. S. 616, 29 Law. Ed. 746, 6 Sup. Ct. Rep. 524, and followed in *Adams v. New York*, 192 U. S. 585, 48 Law. Ed. 575, 24 Sup. Ct. Rep. 372. In *Gouled's* case a federal detective had secretly taken private papers from *Gouled's* office. These papers which were introduced in evidence tended to show that the defendant was guilty of conspiring to defraud the federal government. The Court in reversing the conviction said:

"Where in the progress of a trial it becomes probable that there has been an unconstitutional seizure of papers it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial."

The illegal seizure of documents or articles must be, in order to bring them within the federal exclusion rule, by federal agents or officers. Thus, state officers who furnish the federal officers with the evidence seized unlawfully are classified as private persons under the federal rule. *Gambino v. United States*, 275 U. S. 310, 72 Law. Ed. 139, 48 Sup. Ct. Rep. 137. Where, however, state officers are co-operating with federal officials, the evidence which they ob-



tain must be considered as having been secured in violation of the Federal Constitution. *Gambino v. United States*, *supra*.

The more recent decisions while recognizing the accepted rule deny its application where the facts are not clearly within the doctrine of exclusion as exemplified in the *Gouled* case. *Seguro v. United States*, 275 U. S. 106, 72 Law. Ed. 90, 48 Sup. Ct. Rep. 77; *Marron v. United States*, 275 U. S. 192, 72 Law. Ed. 45, 48 Sup. Ct. Rep. 74.

In *Olmstead v. United States*,—U. S.—, 72 Law. Ed. 662, 48 Sup. Ct. Rep. 564, (1928) the Supreme Court by a vote of five to four held that evidence obtained by federal prohibition officers by illegally tapping telephone wires outside of the house was admissible. In construing this as without the protection of the Fourth Amendment of the Federal Constitution the Court has placed a limitation upon the amendment which seems scarcely harmonious with the tendency it has shown in other opinions in analogous, though not identical, situations. Obviously, the rule of exclusion is not uniformly and logically applied.

### § 102. What Seizures Are Illegal.

The protection of the Fourth Amendment of the Federal Constitution is in part against "unreasonable searches and seizures." Two classes of articles which might become the subject of such seizures have been recognized, first, a man's private books and papers; second, things stolen or forfeited for non-payment of duties. In the first case it is clear that the government is not entitled to possession of the seized articles; in the second, the government is entitled to possession and it becomes merely a question of how that possession is to be effected. *Boyd v. United States*, 116 U. S. 616, 29 Law. Ed. 746, 6 Sup. Ct. Rep. 524.

In possessing these articles to which the government is entitled to possession there has been recognized from the beginning of our government a distinction as to the necessity for a search warrant between goods subject to seizure when concealed in a dwelling house, or similar place, and

when in the course of transportation. *Carrol v. United States*, 267 U. S. 132, 69 Law. Ed. 543, 45 Sup. Ct. Rep. 280. If the evidence sought by the government be in a dwelling a warrant must be obtained. If, however, the evidence to be seized be in a ship, wagon or automobile if there be probable cause for believing that liquor or other prohibited articles are being transported, the search may lawfully be made without a warrant. The reason for the distinction lies in the inability of an officer to get a warrant for a moving vehicle in time to be of practical value. The guarantees of the Fourth Amendment are preserved by these rules as a warrant is required wherever reasonably practical. Where no warrant is issued the seizing officer acts at his peril unless he can show probable cause. *Carrol v. United States*, *supra*. For a discussion of illegal seizures in New York, see *People v. Chiagles*, 237 N. Y. 193, 142 N. E. 583.

### § 103. Remedies Where Evidence is Illegally Secured.

Where federal officers have unlawfully secured evidence against the accused in violation of the Fourth Amendment of the Federal Constitution the accused has the following possible remedies: First, he may make a preliminary motion and secure the return of his evidence. *Weeks v. United States*, 232 U. S. 383, 58 Law. Ed. 652, 34 Sup. Ct. Rep. 341. Second, he may object to the admission of the evidence when offered upon the trial if that is the first notice that the defendant had that the government was in possession of the papers. *Gouled v. United States*, 255 U. S. 298, 65 Law. Ed. 647, 41 Sup. Ct. Rep. 261. Third, he may object to the admission of the evidence upon the trial of the action itself if the circumstances surrounding the seizure of the evidence are undisputed. *Agnello v. United States*, 269 U. S. 20, 70 Law. Ed. 145, 46 Sup. Ct. Rep. 4. Fourth, he may object to the introduction of any evidence lawfully secured subsequent to and as a result of information secured through an unlawful seizure on the theory set forth in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385,

64 Law. Ed. 319, 40 Sup. Ct. Rep. 182, where the Court said, "If knowledge of the papers is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

**§ 104. Exhibition by Plaintiff of Injured Member of Body.**

The right of the plaintiff in a civil action to exhibit his personal injuries to a jury has been contested, on the ground that to do so would, perhaps, unduly prejudice the jury against the defendant, the argument being that a sympathy with the sufferings or mutilations thus made vivid, may induce the jury, especially as against a corporation, and, particularly, a railway corporation, to render a verdict, regardless of the evidence of culpability. But notwithstanding the danger of unduly prejudicing the defendant in such cases, the exhibition is generally allowed as a proper means of proof. Undoubtedly the exhibition is allowed in all cases where the question in issue is as to the nature and extent of the injuries. *Perry v. Metropolitan St. Ry. Co.*, 68 App. Div. 351, 74 N. Y. S. 1; *McNaier v. Manhattan Ry. Co.*, 4 N. Y. S. 310, aff'd 123 N. Y. 664, 26 N. E. 750; *Orscheln v. Scott*, 90 Mo. App. 352. In *Mulhado v. Brooklyn City Railroad Co.*, 30 N. Y. 370, the exhibition of an injured limb to a surgeon before the jury was held not to be error. Again, where the plaintiff, after testifying as to a hole in his leg since the accident, was permitted, under objection by the defendant, to show his injured leg to the jury, the court said: "As well might it be contended that a man who had lost an arm or leg by a similar injury should not be permitted to appear before a jury to testify in relation to it, as to prevent a party from exhibiting the living effect of a similar injury." *Looram v. Second Ave. R. R. Co.*, 11 N. Y. St. Rep. 652. Ocular demonstration of this character is weighty evidence; but the court should be careful to guard against an abuse of the privilege. Such an abuse is found in *Rost v. Brooklyn Heights R. R. Co.*, 10 App. Div.

477, 41 N. Y. S. 1069, where it was held that, under the circumstances, the exhibition of a child's amputated foot preserved in a glass jar was error. In this case the fact that foot had been amputated was admitted and it was evident that the sole purpose of the exhibition was to excite the sympathies of the jury. Again, a new trial was granted, where an injured child, crying in terror, was shown to the jury. *Butez v. Fonda, J. & G. R. R. Co.*, 20 Misc. 123, 45 N. Y. S. 808.

A plaintiff may be permitted to give the jury a practical demonstration of the effects of an injury, but in some instances the danger of simulation may be sufficient reason for excluding the evidence. "Whether or not such an exhibition shall be allowed is a matter resting largely in the discretion of the trial court, which will not be interfered with except in case of abuse." 22 C. J., p. 789. A case apparently on the border line is *Clark v. Brooklyn Heights R. R. Co.*, 177 N. Y. 359, 69 N. E. 647, *Richardson's Cases in Evidence*, p. 69, where the Court allowed the plaintiff to leave the witness stand assisted, and to exhibit himself to the jury in the act of writing, drinking from a glass of water, etc., to show thereby the extent of some nervous affection resulting from the injury.

It must be noted that the affirmance by the Court of Appeals of the opinion of the Appellate Division was on the ground that the latter acted within its discretion in affirming the decision of the trial court. However, at the same time the court expressed the opinion that a new trial should have been granted.

### § 105. Physical Examination of Plaintiff.

The right of a defendant in a personal injury case to compel the plaintiff to submit to a physical examination before trial is statutory in this state.

Prior to 1894 this right was denied on the ground that the court had no authority, in the absence of a statute, to make an order directing the plaintiff to submit to such an examination. *McQuigan v. D., L. & W. R. R. Co.*, 129 N. Y.



50, 29 N. E. 235, Richardson's Cases in Evidence, p. 81. Section 873 of the Code of Civil Procedure, passed in 1894, conferred upon the court the authority to direct the plaintiff in such a case to submit to a physical examination as a part of an oral examination before trial. *Lyon v. Manhattan Ry. Co.*, 142 N. Y. 298, 37 N. E. 113. By the Civil Practice Act, sec. 306 (in effect April 15, 1921), this statutory provision has been materially changed. The Statute now reads:

"In an action to recover damages for personal injuries if the defendant shall present to the court satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of the court, by order, shall direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. If the party to be examined shall be a female she shall be entitled to have such examination before a physician or surgeon of her own sex."

It is clear that a physical examination may now be had independently and apart from any examination before trial. In a recent case the Appellate Division went so far as to hold that the court had the power to require a sample of the plaintiff's blood to be taken for the purpose of analysis. *Hayt v. Brewster, Gordon & Co.*, 199 App. Div. 68, 191 N. Y. S. 176, Richardson's Cases in Evidence, p. 84.

There is, however, no power in the court to order the plaintiff in a breach of promise action to submit to an examination where the defense sets up physical incapacity on the part of the plaintiff. *Welch v. Verduin*, 121 Misc. 545, 201 N. Y. S. 324.

### § 106. Indecency, or Other Impropriety.

"When justice and the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose a prohibition upon necessary meas-



ures. If such matters were not unshrinkingly discussed and probed, many kinds of crime would remain unpunished. Nevertheless, needless offense to feelings of delicacy, especially by public exhibitions before idle spectators having no responsibility for the course of justice, may well be avoided." Wigmore on Ev., sec. 1159. Where the defendant is charged with rape an inspection of the complaining witness, in the absence of a statute, would not be allowed in New York; nor would an inspection of the defendant for the purpose of proving incapacity to commit the crime. *Garvik v. Burlington, C. R. & N. R. R. Co.*, 124 Iowa 691, 100 N. W. 498. In a personal injury case a photograph of the plaintiff's nude body was held improperly received. *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142. There may also be unnecessary impropriety in other ways. Thus, the exhibition of repulsive objects should not be allowed, unless it is fairly necessary. In *Palmer's case*, Annual Register, p. 422, 473, while allowing experiments as to the effect of strychnia upon dogs and rabbits to be described, the Court refused to allow dogs to be brought into the court yard and killed by strychnia before the jury.

### § 107. Inspection of Premises by Jury in Criminal Actions.

An inspection by a jury of the premises where the crime is charged to have been committed, is permissible in the discretion of the court. Code of Crim. Pro., sec. 411; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44, 5 N. Y. Crim. Rep. 69. But the New York courts have ruled that such inspection or view of premises is no part of the trial or the taking of testimony. In *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, *Richardson's Cases in Evidence*, p. 60, the Court said: "The sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them."

For cases exposing the fallacy that the jury's view is not obtaining evidence as an additional source of knowledge, see *Denver, T. & Ft. W. R. R. Co. v. Pulaski Irrigating*

Ditch Co., 52 Pac. 224; People v. Milner, 122 Cal. 171, 54 Pac. 833.

### § 108. Unauthorized View by Jury.

An unauthorized view by one or more of the jurors is improper and, where the rights of either party have been prejudiced thereby, is ground for granting a new trial. *Curry v. Quait*, 100 Misc. 604, 166 N. Y. S. 367. The theory of a jury trial is that all information about the case should be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut the evidence. If the jurors were permitted to investigate the subject in controversy out of court, there would be great danger of their getting an erroneous or one-sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain. *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072.

### § 109. Inspection of Premises in Civil Actions.

It was held in *Buffalo Structural Steel Co. v. Dickinson*, 98 App. Div. 355, 90 N. Y. S. 268, that the law in New York does not permit jury views in civil actions except in an action for waste. Real Prop. Law, sec. 528. However, in the case of *Manuta v. Lazarus*, decided in the City Court of the City of New York, and reported in 104 Misc. 134, 171 N. Y. S. 1076, Justice Allen held that the expression of the law on this subject in *Buffalo Structural Steel Co. v. Dickinson*, *supra*, was *obiter dicta* and that the Court may, in its discretion, direct the jury to inspect the premises in a civil action. The learned justice stated in the opinion that he had been unable to find a case in point in this state and decided the case at bar on the authority of cases decided in other jurisdictions, many of which hold in accordance with the view expressed in his opinion. See *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514; *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567; *Washburn v. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364, 18 N. W. 328. Although we are in sympathy with

Justice Allen's view of the subject, we find it difficult to agree with him that the statement referred to in the Buffalo Steel Company case is mere dictum.

**§ 110. Physical or Mechanical Inconveniences of Production.**

The court may properly exclude the physical production of a thing because of great inconvenience in producing it, or because it is impossible to produce it, as in the case of land and fixtures, or because it is illegal, as in case of public records required to be kept in a certain place. Greenleaf on Ev., 16th Ed., sec. 13 i.

## CHAPTER IV.

### CIRCUMSTANTIAL EVIDENCE

#### § 111. Circumstantial Evidence Defined.

Evidence of some collateral fact, from which the existence or non-existence of the fact in question may be inferred as a probable consequence, is termed circumstantial evidence.

#### § 112. Relevancy.

Anything which tends to create in the mind a persuasion or belief as to the existence or non-existence of some fact in issue is said to be relevant. *Platner v. Platner*, 78 N. Y. 90. Prof. Thayer says, "There is much looseness and wasted discussion in the use of the term relevancy. Relevancy is an affair of reason and not of law." Thayer's *Cases on Ev.*, 2d. Ed., p. 229. There is little doubt that relevancy of testimony is but a matter of logic and common sense. Yet some matters involving the question of relevancy have so often been before the courts, and the issues so often ruled upon, that the logic of the judges may be said to acquire the authority of law. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 75. For a discussion of the subject read *Greenleaf on Ev.*, 16th Ed., sec. 14.

#### § 113. Inference Based on Facts.

To prove a fact by circumstantial evidence there must be positive proof of the fact from which the inference is to be drawn. An inference cannot be based on an inference. The circumstances must be such as to exclude beyond a reasonable doubt all other inferences except the inference to be drawn from the facts established by direct testimony. *People v. Razezicz*, 206 N. Y. 249, 99 N. E. 557; *Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Warner v. New York, Ontario & Western R. R. Co.*, 209 App. Div. 211, 204 N. Y. S. 607; *Collins v. William W. Spencer & Sons Corp.*, 215 App. Div. 243, 213 N. Y. S. 437.

**§ 114. Doctrine of Exclusionary Rules.**

A fact may be relevant or probative and still be rejected because of certain exclusionary rules. These rules of exclusion are based upon the theory of :

1. Unfair surprise,
2. Undue prejudice, or
3. Confusion of issues.

See Greenleaf on Ev., 16th Ed., sec. 14a; *People v. Razezicz*, 206 N. Y. 249, 269 et seq., 99 N. E. 557, *Richardson's Cases in Evidence*, p. 97; *People v. Harris*, 209 N. Y. 70, 102 N. E. 546; *Rodzborski v. American Sugar Refining Co.*, 210 N. Y. 262, 104 N. E. 616.

**CHARACTER****§ 115. Character as Evidence to Prove or Disprove an Act Done.**

The defendant's character in a criminal prosecution is of probative value as bearing on the innocence or guilt of the accused. In prosecutions for rape, and in homicide cases where the plea is self defense, the character of the complainant and deceased, respectively, may be used in support of the defense. The inference is that a person did or did not do a certain act because his character would predispose him to do or not to do it. Human disposition is more or less of probative value in determining the likelihood of the commission of certain acts. Greenleaf on Ev., 16th Ed., sec. 14b.

**§ 116. Character and Reputation Distinguished.**

Character and reputation are not synonymous terms. Character is what a person is morally, while reputation is what a person is reputed to be. Reputation has been held to be the estimate which the community has of a person's character. If the reputation is bad, the jury may infer that the character is bad. General character has always been proved by general reputation. *Leverich v. Frank*, 6 Or. 212, 14 L. R. A. (N. S.) 690, note.



In the recent case of *People v. Colantone*, 243 N. Y. 134, 152 N. E. 700, the Court of Appeals held it error to exclude testimony of the defendant's reputation in a homicide case, sought to be given by a fellow soldier and other comrades in the army service. The objection to the testimony was that the witness did not know the defendant's reputation in the community where he resided, a rule often enunciated. The Court held that the limitation of the evidence to the community of the defendant's residence was erroneous and that what the defendant's reputation was in the army might be shown. This appears to be a distinct limitation of the old rule. Character may also be shown in negative form by showing that people have not discussed the character of the accused.

#### § 117. Persons Accused of Crime.

It is well settled that the accused is allowed, in criminal prosecutions, to call witnesses to testify to his good reputation in the community in which he lived for the purpose of raising an improbability that he would commit the crime charged. *Cancemi v. People*, 16 N. Y. 501, *Richardson's Cases in Evidence*, p. 107; *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718, *Richardson's Cases in Evidence*, p. 109. Although varying circumstances may affect the strength of the inference to be drawn from proof of defendant's good reputation, yet the right to prove good reputation exists, irrespective of the gravity of the offense charged; *i. e.*, misdemeanors as well as felonies. Thus, the influence of the presumption against commission of crime raised by proof of good reputation would be slight in a case where the charge is fully supported by the testimony of disinterested eye witnesses or where circumstantial evidence is strong and clear. But where the evidence against the accused is weaker, the presumption against the commission of crime by one who is reputed to be of good moral character might secure an acquittal. The rule, in a criminal action, is that if, at the close of all the evidence, there exists in the minds of the jury a reasonable doubt as to the defendant's

guilt, the defendant must be given the benefit of that doubt and acquitted; and if the jury believes the evidence of good reputation offered by the defendant, that may be sufficient to raise a reasonable doubt as to his guilt. *People v. Bonier*, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880; *People v. Trimarchi*, 231 N. Y. 263, 131 N. E. 910. In *People v. Trimarchi*, the Court used the following language: "Evidence of good character is not, of itself, sufficient to raise a reasonable doubt. Such evidence, in order to raise a reasonable doubt, must be believed by the jury. It then may, when considered with all the other evidence in the case, be sufficient to raise a reasonable doubt as to his guilt. This is upon the theory that good character may create a doubt against positive evidence, but this doubt against positive evidence is created only when in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness of the positive evidence tending to establish guilt. In such case the defendant must be given the benefit of the doubt." See, also, *Edgington v. United States*, 164 U. S. 361, 41 Law. Ed. 467, 17 Sup. Ct. Rep. 72.

There is also no presumption as to good character and the defendant is the only party who is privileged to raise the issue. *People v. Lingley*, 207 N. Y. 396, 101 N. E. 170, 46 L. R. A. (N. S.) 342; *Greer v. United States*, 245 U. S. 559, 62 Law. Ed. 469, 38 Sup. Ct. Rep. 209. The prosecution is not permitted to prove the bad character of the accused until the defendant has introduced evidence of his good character. *People v. White*, 14 Wend. (N. Y.) 111; *People v. Sharp*, 107 N. Y. 427, 457, 14 N. E. 319, 1 Am. St. Rep. 851.

A recent statutory enactment has made it possible for the state, in rebutting the good character evidence offered by the defense, not only to show the bad character of the defendant by reputation evidence, but also to introduce evidence of the defendant's conviction of other crimes. Code of Criminal Procedure, sec. 393c, Laws of 1927.

As a matter of pure logic it is obvious that the inference that a quarrelsome man would be likely to commit an assault or that a dishonest man probably committed larceny

is just as strong as the argument that a peaceable man probably did not commit an act of violence or that an honest man would not steal. However, in spite of the obvious relevancy of the evidence, in all common law jurisdictions the rule is firmly established in policy and tradition that the prosecution may not initially attack the defendant's character. The reason for this rule is found in our uniform policy of throwing every possible safe-guard around the man accused of crime, in order to insure him a fair trial, free from prejudice. "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court." Wigmore on Ev., sec. 57.

#### **§ 118. Reputation Must Concern Traits Involved.**

The proof of character in criminal actions must be confined to the trait involved or have some logical connection with it. Thus, chastity may be shown in prosecutions for adultery, indecent assault or rape, but is irrelevant in a homicide case. General moral character is not sufficiently specific to be relevant in cases of homicide, illegal sale of liquor or larceny. Honesty is relevant on an issue of larceny, embezzlement or receiving stolen goods. The defendant's reputation for industry cannot be shown in a prosecution for arson. Peaceableness and quietness may be shown where personal violence is involved, as in cases of assault, carrying concealed weapons, homicide, rape or train wrecking, but it is not material on an issue of libel. Sobriety cannot be shown on an issue of larceny. The defendant's veracity is a proper subject of inquiry when the charge made against him is perjury, but this trait is irrelevant in a case involving an assault with intent to kill, homicide or larceny unless the defendant himself takes the witness stand, in which instance his reputation for veracity might affect his credibility. *Harper v. United States*, 170 Fed. 385; 22 C. J., p. 475, and authorities there cited.

Such testimony must be confined solely to the witness's knowledge of the defendant's reputation in such respects. A witness will not be permitted to testify as to such traits from his own personal knowledge and observation of the defendant's conduct. But negative evidence is receivable to establish a good reputation; *e. g.*, a witness may testify that he has lived for a considerable length of time in the same neighborhood as the defendant and has never heard anything against him in respect to his peaceableness or quiet behavior or honesty. *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718, *Richardson's Cases in Evidence*, p. 109; *People v. O'Regan*, 221 App. Div. 331, 223 N. Y. S. 339.

#### § 119. Defendant as Witness.

The defendant may be at once a party and a witness. If the defendant testifies, his general reputation for veracity may be attacked as that of any other witness, or, upon cross-examination, he may be interrogated as to any specific act or thing which may affect his character and tend to show that he is not worthy of belief. But, by taking the witness stand, the defendant does not "open the door" to the prosecution to introduce evidence as to his general bad reputation. The rule in all cases is that the prosecution may not show the defendant's bad reputation unless the defendant first offers some evidence of his good reputation. *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676, *Richardson's Cases in Evidence*, p. 117; *People v. Richardson*, 222 N. Y. 103, 118 N. E. 514; *People v. Johnston*, 228 N. Y. 332, 127 N. E. 186.

#### § 120. Character of Complainant in Prosecution for Rape.

Where a defendant is charged with rape the complainant's reputation for chastity is relevant to the issue as to whether the defendant ravished the complainant by force, for if the complainant consented, the charge cannot be sustained, since non-consent is an essential element of the crime. The defendant is permitted to show that the complainant's repu-



tation for chastity was bad upon the theory that it is more probable that an unchaste woman consented to such intercourse than one of strict virtue. And upon the same theory, the defendant may show previous acts of immorality with the complainant, for this would give rise to an inference that she did not resist, but consented to the act charged against the defendant. *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309, *Richardson's Cases in Evidence*, p. 120. The New York decisions are in conflict as to whether particular instances of unchastity of the complainant with men other than the defendant may be shown. Particular acts are held to be competent in *Brennan v. People*, 7 Hun 171, and *People v. Abbot*, 19 Wend. (N. Y.) 192. Particular acts are held not competent in *People v. Jackson*, 3 Park. Crim. Rep. (N. Y.) 391. As the question was not in issue, in *Woods v. People*, 55 N. Y. 515, the court expressly refused to determine it. The great weight of authority in other jurisdictions supports the proposition that evidence of specific acts of unchastity with other persons than the accused is inadmissible. 14 L. R. A. (N. S.) 714, note, and cases there cited.

When the prosecution is for statutory rape in the second degree (Penal Law, sec. 2010), since non-consent is not an element of the crime charged, the character for chastity of the complaining witness is irrelevant.

#### **§ 121. Character of Complainant in Prosecution for Seduction.**

By statute (Penal Law, sec. 2175), the previous chaste character of the woman alleged to have been seduced is one of the essential elements of the crime of seduction under promise of marriage. "Previous chaste character," as used in the statute, means actual personal virtue, and not mere reputation for it. In such instances, character is directly and not collaterally in issue. In a leading case in New York, it was held that the chastity of a woman, alleged to have been seduced, can be attacked only by proof of specific acts of lewdness. *Kenyon v. People*, 26 N. Y. 203, 84 Am.



Dec. 177; *People v. Nelson*, 153 N. Y. 90, 96, 46 N. E. 1040, 60 Am. St. Rep. 592.

The same rule applies to a prosecution for abduction under the Penal Law, sec. 70, sub. 2. Otherwise, in abduction, incest and bastardy proceedings the character of the complaining witness is never in issue, and evidence of specific acts of, or of general reputation for unchastity is incompetent. Penal Law, sec. 70. See note, 14 L. R. A. (N. S.), 725 and 733. But it is competent, in a prosecution for bastardy, to prove specific instances of sexual intercourse between the mother and men other than the accused, at and near the beginning of the period of gestation, when the child must have been conceived. *People v. Schildwachter*, 87 Hun 363, 34 N. Y. S. 352; *People v. McKay*, 72 App. Div. 527, 76 N. Y. S. 600.

### § 122. Character of Deceased in Homicide Cases.

"Upon a trial for murder, the accused, after giving evidence tending to show that he acted in self-defense, may prove that the general reputation of the deceased was that of a quarrelsome, vindictive or violent man and that such reputation had come to his knowledge prior to the homicide." *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1, *Richardson's Cases in Evidence*, p. 121. Specific acts of violence toward third persons may never be shown. The testimony must be confined to the general reputation of the deceased for violence. *People v. Druse*, 103 N. Y. 655, 8 N. E. 733. Such evidence is received to show, not that the deceased was the aggressor, but that the accused acted upon the reasonable and honest belief that his life was in peril. Since the sole ground on which the evidence is admitted is to show the state of the defendant's mind as to the necessity of defending himself, it is clear that the reputation of the deceased for violence is inadmissible unless it is also shown that such reputation was known to the accused at the time of the homicide. *People v. Rodawald*, *supra*. On the other hand, threats of the deceased are admissible, even if they have not been communicated to the defendant. This is not character

evidence, but is introduced to show the state of mind of the deceased and to raise an inference that he was the aggressor. *Stokes v. People*, 53 N. Y. 164, *Richardson's Cases in Evidence*, p. 221; *People v. Taylor* 177 N. Y. 237, 69 N. E. 534.

### § 123. Character in Civil Actions.

Evidence of the good or bad character of either party, although some times logically probative for the reason that it would predispose him to do or not to do a certain act, is rejected in civil actions where character is not directly in issue. Where the question in issue is whether a contract was made or broken, money paid or property misappropriated, the character of the parties is not in issue. The business of the court is to try the case not the man, for a very bad man may have a most righteous case. *Gough v. St. John*, 16 Wend. (N. Y.) 646; *Taylor v. Heft*, 150 App. Div. 509, 135 N. Y. S. 450, *Richardson's Cases in Evidence*, p. 132.

### § 124. When Character is in Issue.

"'Putting character in issue' is a technical expression and confined to certain actions, from the nature of which the character of the parties, or some of them, is of particular importance." *Norris v. Stewart's Heirs*, 105 N. C. 455, 10 S. E. 912. The principal civil actions in which character evidence is admissible are:

1. Libel and slander,
2. Seduction,
3. Criminal conversation,
4. Malicious prosecution, and
5. Breach of promise of marriage.

### § 125. Character in Libel and Slander.

In an action for defamation of character the defendant may, in mitigation of damages, show the plaintiff's bad reputation. If the plaintiff has a generally bad reputation,

he brings his action for an injury to something that does not exist. An injurious act is less injurious in its consequences than it otherwise would be if it affects something already damaged. Otherwise, a reputed thief would be in the position of an honorable man. But in such cases the evidence must be confined to the general reputation of the plaintiff, and not to rumors or reports or specific instances of misconduct. 38 L. R. A. (N. S.) 1179, note; Wuensch v. Morning Journal Association, 4 App. Div. 110, 38 N. Y. S. 605; Ellis v. Wood, 108 Misc. 478, 177 N. Y. S. 730; Abell v. Cornwall Industrial Corp., 241 N. Y. 327, 150 N. E. 132.

Though common report that the plaintiff in a libel action had misbehaved is not competent to prove the truth of such statement in the libel, such common report may, however, come in when it is strictly for the purpose of rebutting an inference of malice. Abell v. Cornwall Industrial Corp., *supra*.

### § 126. Seduction.

In an action by a father for his daughter's seduction, the defendant may, for the purpose of mitigating the damages, show the daughter's previous unchastity, not only by general reputation, but also by specific acts. Wandell v. Edwards, 25 Hun 498; Hogan v. Cregan, 6 Robt. (N. Y. Super.) 138.

### § 127. Criminal Conversation.

In a husband's action for criminal conversation, the wife's reputation for unchastity, or any specific acts of misconduct, may be shown by the defendant in mitigation of damages. Harter v. Crill, 33 Barb. (N. Y.) 283; Pratt v. Andrews, 4 N. Y. 493.

### § 128. Malicious Prosecution.

In an action for malicious prosecution the defendant, in order to show that he had probable cause, and also that he acted without malice, and in mitigation of damages, may show the general bad reputation of the plaintiff; but this

cannot be shown by specific acts, or by an opinion based upon specific acts. *Hart v. McLaughlin*, 51 App. Div. 411, 413, 64 N. Y. S. 827.

### § 129. Breach of Promise of Marriage.

In an action for a breach of promise of marriage, the defendant, in mitigation of damages, may introduce evidence of the plaintiff's unchaste character. This may be shown either by general reputation or by specific instances. *Johnson v. Caulkins*, 1 Johns. Cases (N. Y.) 116, 1 Am. Dec. 102; *Lynch v. Figge*, 194 App. Div. 126, 185 N. Y. S. 777; *Brisack v. King*, 199 App. Div. 213, 191 N. Y. S. 477. Furthermore, if the defendant can prove that the plaintiff had illicit intercourse with another prior to the promise of marriage and then unknown to the defendant, or subsequent to the promise, this is a complete defense to the action, upon the theory that personal purity is one of the implied conditions of the plaintiff's agreement. This, however, is not strictly character evidence and does not "open the door" to the plaintiff to offer in rebuttal, evidence of her general reputation for virtue. *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, *Richardson's Cases in Evidence*, p. 129.

Evidence of the general reputation of the defendant's wealth is also admissible on the question of damages, not for the purpose of proving his ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract. *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784. It was held, in *Meyer v. Mayo*, 173 App. Div. 199, 159 N. Y. S. 405, that the plaintiff is also entitled to prove the defendant's actual wealth as distinguished from his financial reputation.

### § 130. Plaintiff's Reputed Good Character.

In civil actions in which character is in issue, evidence of the plaintiff's reputed good character should not be admitted until and unless the defendant has introduced evidence of the plaintiff's bad character. *Pratt v. Andrews*, 4 N. Y.

493; McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Richardson's Cases in Evidence, p. 129.

### § 131. Pleadings May Put Character in Issue.

If the plaintiff's pleadings allege a good reputation, the answer may put character in issue. Thus, in *Stafford v. The Morning Journal Association*, 142 N. Y. 598, 37 N. E. 625, the defendant, by his answer, put the reputation set forth in the complaint in issue, and opened the door for evidence of good reputation by the plaintiff, as part of her case.

### § 132. Character of a Disorderly House.

The character of an alleged disorderly house may be proved by

1. The testimony of witnesses concerning occurrences, in the presence of the defendant, at the house in controversy.

2. The general reputation of the house.

3. The reputation of the inmates or frequenters of the house. *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182; *People v. Pasquale*, 206 N. Y. 598, 100 N. E. 413, Richardson's Cases in Evidence, p. 135; Penal Law, sec. 3, sub. 9.



## CHAPTER V.

### CIRCUMSTANTIAL EVIDENCE (Continued)

#### Facts and Conduct Other than Character as Indirect Evidence of an Act Done

##### § 133. Physical Capacity.

Physical strength or capacity may be shown as indicating a likelihood of a person doing or not doing a certain act. Thus, one accused of crime may show that he was physically incapable of committing it, or that, at the time, he was prostrated by a disease which rendered it highly improbable that he could have endured the labor and exertion necessary to commit the crime. *Ingalls v. State*, 48 Wis. 647, 651, 4 N. W. 785. See, also, *People v. Galbo*, 218 N. Y. 283, 112 N. E. 1041, *Richardson's Cases in Evidence*, p. 137. Again, evidence of bodily strength of one resisting arrest, or that defendant was a powerful man, the death wound having been caused by a blow requiring great strength, may be shown. *Thiede v. Utah*, 11 Utah 241, 39 Pac. 837, aff'd 159 U. S. 510, 40 Law. Ed. 237, 16 Sup. Ct. Rep. 62.

##### § 134. Skill or Technical Knowledge.

A person's skill or technical knowledge may be of probative value to show the probable doing or not doing of a certain act. Instances of this principle are found in questions of imitation of handwriting, *Croom v. Sugg*, 110 N. C. 259, 14 S. E. 748; of knowledge of poison, *People v. Molineux*, 168 N. Y. 264, 277, 61 N. E. 286, 62 L. R. A. 193, *Richardson's Cases in Evidence*, p. 143; and of experience in executing legal documents, or want of experience as negating the authorship of documents, *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555.

##### § 135. Means.

The possession or lack of the requisite means to accomplish a certain act may be of probative value to raise an

inference that the act was or was not done by the person in question. For example, in the celebrated Molineux case, cited in the preceding paragraph, the prosecution was permitted to show that the defendant had a well-equipped laboratory, which contained all the necessary chemicals from which the cyanide of mercury could be produced, in order to prove that the defendant possessed the requisite means to produce the poison which killed the victim. Evidence of this nature is always admissible if the means are peculiar and such as men generally are not familiar with or capable of using. *People v. Brotherton*, 47 Cal. 388, 402. But this rule cannot be extended so as to admit proof of the mere possession of ordinary tools suitable to the commission of a particular crime, where there is no other evidence tending to connect the defendant with the crime charged. *Sorenson v. United States*, 168 Fed. 785, 793.

Ordinarily, the possession or the lack of the peculiar means to accomplish a certain act are equally admissible, but in cases where the act sought to be proved involves the payment of money, a somewhat different rule obtains. Lack of pecuniary means may always be shown. For example, where the genuineness of certain notes was in question and the defendant testified that they were given in part payment of a loan previously made by him, evidence was properly admitted to show that the defendant was in such financial difficulties at the time when he claimed to have made the loan that he lacked the means of making it. This evidence was relevant as tending to show the improbability of the defendant's story. *Pontius v. People*, 82 N. Y. 339, 350. But evidence of the possession of money or wealth is not admissible to raise a presumption of payment, for the reason, as stated in *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728, that "Experience is not sufficiently unanimous to raise a presumption that one who has the means of paying a debt will actually pay it." Such evidence is admissible only in rebuttal after evidence tending to show lack of pecuniary means has been introduced by the opposite party. Thus, in *Dick v. Marvin*, 188 N. Y. 426, 81 N. E. 162, where

the plaintiff had sought to defeat the defense of payment by proof of the defendant's inability to pay, it was held to be competent for the defendant to introduce the testimony of other witnesses to prove that, in fact, he did possess sufficient money at the time in question to make the alleged payment.

### **§ 136. Habit or Custom in Business Affairs.**

It is generally conceded that one's habit or custom of doing or not doing an act in question increases or diminishes the probability of the act being done. Instances: To show that a notice was mailed on a certain day, which is denied, it is relevant to prove one's custom to be at home on that day for the purpose of transacting business of that kind. *Beakes v. DaCunha*, 126 N. Y. 293, 27 N. E. 251. The habit of a notary public, as to giving notice on the same day as demand for payment, is admitted to show that notice was given. *Miller v. Hackley*, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372. An attorney who drew and witnessed a will, but has forgotten the circumstances of its execution, may testify that he is in the habit of drawing wills and is careful always to have them executed according to the statute. *Matter of Kellum*, 52 N. Y. 517.

### **§ 137. Habit or Custom in Negligence Cases.**

The general rule in this state is that evidence of a person's habitual conduct under similar circumstances in respect to using care is inadmissible for the purpose of raising an inference that he exercised the same amount of caution on the occasion when the injury in question was sustained. Such evidence is excluded on the theory that it borders too closely on character evidence, as showing a careful or careless disposition, and is therefore inadmissible in civil actions on the same grounds. *Wigmore on Ev.*, sec. 97.

"It has been many times held that it is not competent for a plaintiff to give evidence that the person by whom the alleged negligent act was committed had previously committed similar acts, or that he was generally negligent or un-

skillful." *Wooster v. Broadway & Seventh Ave. R. R. Co.*, 72 Hun 197, 25 N. Y. S. 378.

In *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465, *Richardson's Cases in Evidence*, p. 183, the trial court admitted evidence to show that the flagman employed by the defendant, at the crossing where the accident occurred, had been intoxicated on several previous occasions and that his intemperate habits were known to the officers of the railroad company. The Court of Appeals held that this was error, saying: "His previous habits of intemperance had nothing to do with the case. If the signal was omitted, the negligence was the same, whether the flagman was drunk or sober. His neglect on a former occasion, or his former intemperate habits, would not be sufficient to create negligence, or be any evidence of it, when this accident happened."

Such evidence is admissible, however, where a claim for exemplary damages is made. In such a case it is no part of the evidence on the issue of the defendant's negligence on the occasion in question, but is received solely for the purpose of charging the defendant with gross negligence in employing or retaining a servant, knowing that he was incompetent or, from bad habits, unfit for the position he occupied. *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375, *Richardson's Cases in Evidence*, p. 184. For this purpose the incompetency of the servant may not be established by proof of his general reputation for carelessness, but must be shown by evidence of specific acts of incompetence and, in addition, evidence that the master knew or ought to have known of them. The latter may be shown by evidence that they were generally known in the community. *Park v. N. Y. C. & H. R. R. Co.*, 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663; *McCarty v. Ritch*, 59 App. Div. 145, 69 N. Y. S. 129.

Recently our courts have been concerned with the admissibility of evidence of this nature chiefly in connection with the question of contributory negligence on the part of the plaintiff. The opinion of Mr. Justice Vann in the case of *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A.



(N. S.) 683, Richardson's Cases in Evidence, p. 187, contains an able review of the leading authorities on this point in our own and other jurisdictions. In that case the plaintiff's intestate, a pedestrian, was killed by the defendant's trolley car in the presence of four eye witnesses, who testified at the trial. A witness who had known the decedent for eight years and frequently walked through the streets of New York with him, testified, under objection, as follows: "When we were about to cross railroad tracks, he usually looked to the right and to the left of him and put a restraining hand on my arm before crossing, to make sure that there were no vehicles of any kind coming." The Court of Appeals, in reversing the judgment on this ground, held that evidence of usual conduct on similar occasions, although relevant as tending somewhat to show like conduct on the occasion in question, is inadmissible at least in a case where there are surviving eye witnesses who can testify to the plaintiff's actual conduct on the occasion of the accident; and at the same time the Court expressly refused to pass upon the question of the admissibility of such evidence in a case where there is no eye witness. In the case of *Parsons v. Syracuse B. & N. Y. R. R. Co.*, 205 N. Y. 226, 98 N. E. 331, plaintiff's intestate was killed in an attempt to cross the defendant's tracks and there was no surviving eye witness. On a former trial of this action, the plaintiff was permitted to prove that on ten or eleven previous occasions the decedent, when passing over the same crossing, had stopped to look up and down the track. The Appellate Division reversed (133 App. Div. 461, 117 N. Y. S. 1058) on the ground that evidence of specific instances of care on prior occasions is inadmissible for the reason that it would too greatly multiply the issues. On the second trial, therefore, the evidence on this point was confined to testimony that the decedent was a man of prudent character, well acquainted with the crossing, and that a few moments before the accident he was conducting himself and managing his horse in a careful manner. The Court of Appeals held this evidence inadmissible to show that the decedent acted in a



prudent manner at the time of the accident, even though there was no surviving eye witness to testify for him. In a recent California case it was held that, where a person is killed in an accident and there is no surviving eye witness, evidence of the decedent's habit of care and caution under similar circumstances is admissible as tending to show that he was not guilty of contributory negligence. *Wallis v. Southern Pac. Co.*, 184 Cal. 662, 195 Pac. 408, 15 A. L. R. 117. The precise question decided in that case is still an open one in New York, but from the trend of the decisions in this State it is doubtful whether our courts would follow the ruling in the California case. It should be noted in this connection that since the amendment to the Code of Civil Procedure in 1913 (Code of Civ. Pro., sec. 841 b, now Civil Practice Act, sec. 265), the plaintiff in an action for causing death by negligence no longer has the burden of proving freedom from contributory negligence as a part of his affirmative case. Therefore, the practical necessity for the rule laid down in the California case of *Wallis v. Southern Pac. Co.*, *supra*, has been removed in this State. For a review of the authorities in the various jurisdictions, see 15 A. L. R. 125, note.

### § 138. Evidence of General Usage in Negligence Cases.

When one of the issues is a question of negligence by reason of a failure to provide adequate safety devices or to take sufficient precautions for the protection of persons to whom a duty of care is owed, evidence of general usage and practice in the same kind of business is competent as tending to establish a standard by which ordinary care may be judged. "Such evidence is received for what it is worth in view of all the circumstances of the particular case, and, under proper instruction from the court as to its inconclusive nature, the jury has a right to give it such consideration as they think it should receive in connection with all the other facts." *Shannahan v. Empire Engineering Corp.*, 204 N. Y. 543, 98 N. E. 9, 44 L. R. A. (N. S.) 1185. In *Marus v. Central Railroad Co.*, 175 App. Div. 783, 161 N. Y. S. 546,

the Court pointed out that such evidence, though entitled to proper consideration, is not conclusive or controlling, and said: "Otherwise incorporated employers, by their general custom or habit of acting, could create a rule for their own exemption." The Appellate Division granted a new trial in the case of *Cline v. Northern Central Railroad Co.*, 181 App. Div. 203, 168 N. Y. S. 303, because the trial court committed error in charging the jury that "the usual and ordinary inspection commonly adopted by other railroads is not negligence," whereas, the correct rule of law on this subject, as stated in the opinion, is that "such evidence is only received for what it is worth and the weight thereof is entirely for the jury." Furthermore, evidence of this nature should never be received unless it is shown (1) that the conditions existing at the places where the safety devices and precautions in question were employed were similar to those existing at the place and time when the accident occurred, and (2) that, if such safety devices and precautions had been employed, they would have prevented the accident. *McKinney v. New York Consolidated R. R. Co.*, 230 N. Y. 194, 129 N. E. 652, *Richardson's Cases in Evidence*, p. 195.

Where there is no uniformity of circumstances, evidence of a custom or usage should be rejected as having no probative value. In *Schumer v. Caplin*, 241 N. Y. 346, 150 N. E. 139, the Court found that the introduction of the usage and custom of window cleaners as to the use of safety devices was error, as each case would be dependent upon the width of the sill, its slope, and other features of its dimension and form.

### § 139. Specific Sales Inadmissible to Show Value.

In New York, sales of other pieces of real property in the vicinity are not received in evidence to show the value of the property in issue. The argument for excluding this line of evidence has been stated by the Court of Appeals as follows:

"A party may not establish the value of his land by showing what was paid for another parcel similarly situated, be-

cause it operates to give to the agreement of the grantor and grantee the effect of evidence by them, that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out so far as the question of damages is concerned by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land; and second, the circumstances surrounding the parties which induced the conveyance. Such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market. Or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate might present two side issues which could be made the subject of as vigorous contention as the main issue, and if the transactions were numerous it would result in unduly prolonging the trial and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult." *Matter of Thompson*, 127 N. Y. 463, 468, 28 N. E. 389, 14 L. R. A. 52, *Richardson's Cases in Evidence*, p. 200. See, also, *Jamieson v. Kings Co. Elevated Ry. Co.*, 147 N. Y. 322, 41 N. E. 693; *Ettlinger v. Weil*, 184 N. Y. 179, 77 N. E. 31; *Meehan v. Kaufman*, 222 App. Div. 456, 226 N. Y. S. 734.

The present market value of the property in controversy may be shown by the testimony of expert witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity,

they may be asked to name such sales of property and the prices paid therefor, as have come to their attention. Then upon a redirect examination of such a witness, he may be questioned concerning the instances thus brought out, but he may not give testimony with respect to property not embraced in such cross-examination. *Robinson v. New York Elevated Ry. Co.*, 175 N. Y. 219, 67 N. E. 431, *Richardson's Cases in Evidence*, p. 197.

The value of personal property having a recognized and standard value, such as wheat, cotton or oil, may be proved by showing the market price from actual sales on the day in question. *Matter of Thompson, supra*.

In proving the value of personal property which has no standard market value, the cost price is admissible as some evidence of value. *Hawver v. Bell*, 141 N. Y. 140, 36 N. E. 6. See, also, *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032, *Richardson's Cases in Evidence*, p. 205.

Where the value of services is in issue, evidence of the amount paid by others for similar work will not be received. *Wildhack v. Cheltenham Advertising Agency*, 160 N. Y. S. 1078.

#### § 140. Course of Dealing Between Parties.

*those  
other  
parties  
are  
relevant*

In contract cases, it is held that the contract in question cannot be proved by evidence of similar contracts with third persons or strangers, but other contracts and dealings between the same parties are sometimes received to prove their course of dealings or intention, or the probability or improbability of entering into the contract claimed. *McLoughlin v. Nat. M. V. Bank*, 139 N. Y. 514, 522, 34 N. E. 1095; *Livingston v. Stevens*, 122 Iowa 62, 94 N. W. 925; *Pierson v. Atlantic National Bank*, 77 N. Y. 304, 311; *Costello v. Herbst*, 16 Misc. 687, 38 N. Y. S. 1123.

#### § 141. Conduct Evidencing Design or Plan.

The existence of a design or plan to do an act is some evidence to show that the act in question was done. While it is true that a design or plan is not always carried out, yet



it is more or less likely to be; hence, its probative value. The existence of a design or plan is evidenced chiefly by conduct, and the kinds of conduct are innumerable. It may be said that any act, which, under the circumstances and according to experience, as naturally interpreted and applied, would indicate a probable design, is relevant and admissible. For instance, the possession of tools or means for doing an act is admissible as a significant circumstance; *i. e.*, a probable design to use them. Thus, the sharpening of a knife just before the affray in which the knife was used, was admitted as an act of preparation, *People v. Tice*, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669, *Richardson's Cases in Evidence*, p. 1041; and getting a revolver out of pawn, a few days before the murder, was admitted to show deliberate intent, *People v. Scott*, 153 N. Y. 40, 46 N. E. 1028, *Richardson's Cases in Evidence*, p. 703. See, also, *People v. Katz*, 154 App. Div. 44, 139 N. Y. S. 137, *aff'd* 209 N. Y. 311, 103 N. E. 305, *Richardson's Cases in Evidence*, p. 210.

Whether or not the statements or conduct offered for the purpose of evidencing design or plan are too remote in point of time is usually a question that is left to the discretion of the court. *Hale v. Life Indemnity & Investment Co.*, 65 Minn. 548, 68 N. W. 182.

#### § 142. Threats as Evidence of Design or Plan.

A threat to do an act creates a probability that it will be done. "When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the act was the perpetrator or instigator." *Swift on Ev.*, p. 136.

Threats made by the deceased against one charged with the homicide are received on the issue of self-defense, as tending to show that the deceased was the aggressor. The deceased's design to do violence is some evidence to show that the design was carried out, and threats made by the deceased to kill the defendant are admissible in such cases, even though they are not communicated to the defendant. This is upon the theory that an attempt to execute



threats is equally probable, whether communicated or uncommunicated to the party threatened. *Stokes v. People*, 53 N. Y. 164, 174, 13 Am. Rep. 492, *Richardson's Cases in Evidence*, p. 221; *People v. Taylor*, 177 N. Y. 237, 69 N. E. 534.

Whenever it is necessary to establish which party was the aggressor, threats are admissible. Thus, in a civil action for assault, where the defense was that the plaintiff was the original assailant, the Court of Appeals held that the defendant should have been permitted to prove that the plaintiff had threatened him with bodily harm prior to the time of the alleged assault. *Faurie v. Lazelle*, 205 N. Y. 526, 99 N. E. 80.

### § 143. Mental Incapacity.

It often becomes important, in both civil and criminal cases, to prove mental incapacity of one of the parties, and this incapacity is evidenced largely by circumstantial evidence. *Wigmore on Ev.*, sec. 227, gives three classes of facts from which a person's mental condition may be inferred, as follows: "(1) The person's outward conduct, manifesting the inward and causing condition, (2) pre-existing external circumstances tending to produce a special mental condition, and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred."

(1) Conduct as evidence of mental condition. For the purpose of showing the mental condition of a person, "any and all conduct of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or another upon the issue." *Wigmore on Ev.*, sec. 228. *People v. Wood*, 126 N. Y. 249, 257, 27 N. E. 362, *Richardson's Cases in Evidence*, p. 224.

(2) Circumstances tending to produce a special mental condition. After some evidence has been received tending to show a diseased condition of the brain, evidence may be

given of any external event or circumstance which may have produced such a physical or mental shock as to be a sufficient cause for a deranged mental state. For example, it is proper to show that the person whose mental capacity is in question had previously had a serious fall or received a severe blow or cut on the head, and it is equally relevant to show that he had received a severe mental shock, such as the sudden information of his wife's adultery. In the leading case of *People v. Wood*, *supra*, the court used the following language: "It is not disputed that a fall on the head, a physical injury to the brain, or other physical and sufficient cause for insanity can be proved. Any material fact which might account for a lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased, and might result in insanity as naturally as blows upon the head? This, in connection with evidence tending to show insanity at the time of the act done, is proper. In fine, the evidence is admitted on the ground that it is corroborative, more or less strongly, of the mental condition which the other and separate evidence in the case tends to prove."

In some jurisdictions it is held that, after the introduction of evidence to show that a person has received information tending to produce a severe mental shock sufficient to precipitate him into insanity, it is proper to offer, in rebuttal, facts contradicting the truth of the statements claimed to have been made, as tending to raise an improbability that the statements were, in fact, made. *Knapp v. State*, 168 Ind. 153, 79 N. E. 1076. This evidence is rejected in New York, however, on the ground that it raises too many collateral issues. Thus, where evidence is given that the defendant's wife had told him that she was pregnant as a result of improper relations with another man, it is improper to receive evidence, in rebuttal, to show that the defendant's wife was not pregnant at the time. *People v. Harris*, 209 N. Y. 70, 102 N. E. 546.

Evidence as to the insanity of ancestors or other relatives

is admissible, but only after some independent evidence has been given of insane conduct on the part of the person whose mental capacity is in question. *Walsh v. People*, 88 N. Y. 458; *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150. As stated in the case of *Pringle v. Burroughs*, *supra*, at page 383, "The principle which runs through all these cases, and others which might be cited to the same effect, is that mental derangement is not to be inferred in the absence of some manifestation of its existence in the person whose capacity is under investigation; so that while proof of hereditary tendency may add to the weight which might be given to personal manifestations of insanity it will not suffice of itself to establish that any mental disorder exists." Where evidence is sought to be introduced that ancestors or other relatives of the person in question suffered from a disease affecting their mental faculties, such as epilepsy or paresis, it must first be shown that that particular disease tends to produce insanity and that it is hereditary or transmissible. *Matter of Myer*, 184 N. Y. 54, 76 N. E. 920.

(3) Prior or subsequent mental condition. As a condition of mental disease is always more or less continuous, it is proper, in order to ascertain its condition at a given time, to consider its existence prior or subsequent to the time in controversy. As stated in *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, *Richardson's Cases in Evidence*, p. 525, where the question of testamentary capacity was in issue: "It does not follow from this, that evidence of this nature is necessarily to be received, however remote it may be in point of time from the execution of the will. The object of the evidence is to show the mental state of the testator at the time when the will was executed. Of course, therefore, it is admissible only where it has a legitimate bearing upon that question; and of this, the court must judge, as in every other case where the relevancy of testimony is denied. If the judge can see that the evidence offered cannot justly be supposed to reflect any light upon the mental condition of the testator, at the time of making

the will, he has an undoubted right to exclude it." The accused's mental condition during the four months between the homicide and the trial was held competent in *People v. Taylor*, 138 N. Y. 398, 404, 34 N. E. 275.

#### § 144. Motive.

Motive is the moving power which impels one to do an act. It is the inducement for doing the act and, therefore, evidence of the existence of a motive for the crime charged is admissible. While motive is always relevant, yet it is never essential to establish a crime. *People v. Ferraro*, 161 N. Y. 365, 376, 55 N. E. 931.

"It is always a just argument on behalf of one accused that there is no apparent motive for the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumption of innocence and corroborate evidences of guilt." *Kennedy v. People*, 39 N. Y. 245, 254.

#### § 145. Circumstances Indicating Motive.

The circumstances which may indicate a motive for committing an act embrace the whole range of human affairs. The law has never limited them and never can limit them in number or kind. *Hendrickson v. People*, 10 N. Y. 13, 31, 61 Am. Dec. 721; *People v. Sutherland*, 154 N. Y. 345, 352, 48 N. E. 518.

#### § 146. Proof of Other Crimes.

The general rule of evidence applicable to criminal trials, as stated in the celebrated case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, *Richardson's Cases in Evidence*, p. 143, is that evidence tending to prove a defendant guilty of any crime not alleged in the indictment is inadmissible for any purpose, except when it tends to establish

1. Motive,
2. Intent,
3. The absence of mistake or accident,
4. A common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of the one tends to establish the other, or
5. The identity of the person charged with the commission of the crime on trial.

The fundamental principle underlying this rule and its exceptions is simple. A jury will more readily believe a prisoner to be guilty of the crime charged against him, knowing him to have committed other and perhaps similar crimes. Such evidence is of strong probative force and effect, but it has always been excluded in common law jurisdictions on grounds of public policy. By the common law a prisoner is presumed innocent until he has been proved, beyond a reasonable doubt in the minds of a jury, guilty of the crime charged. He is entitled to the full benefit of this presumption, irrespective of his criminal record in the past. The hard and fast rule is, therefore, that evidence tending to prove the commission of another crime may never be given, under any circumstances, for the purpose of raising an inference that the person who committed it would be likely to have also committed the crime charged in the indictment. On the other hand, whenever evidence tends directly to prove the crime charged, it will not be excluded merely because, incidentally, it shows the prisoner to have been guilty of other offenses. It will be seen that the five exceptions defined in the *Molineux* case all fall within this general principle. *People v. Thau*, 219 N. Y. 39, 113 N. E. 556, annotated in 3 A. L. R. 1537; *People v. Richardson*, 222 N. Y. 103, 118 N. E. 514; *People v. Thompson*, 212 N. Y. 249, 106 N. E. 78; *People v. Buffom*, 214 N. Y. 53, 108 N. E. 184.



## EXCEPTIONS TO GENERAL RULE

**§ 147. Evidence of Other Crimes to Prove Motive.**

Evidence of the commission of another crime is admissible when its object is to prove a motive for the crime charged. Instances: In *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, it was shown that the defendant, who was a married man, ran away with the wife of the deceased a few days after the homicide and married her, after taking oath before the clergyman who performed the ceremony that he knew of no legal objection to the marriage. This evidence, although it showed the defendant to be guilty of the crimes of bigamy and perjury, was held admissible on the ground that it showed the defendant's strong desire for the possession of the deceased's wife as a motive for getting rid of the husband. In *People v. Scott*, 153 N. Y. 40, 46 N. E. 1028, Richardson's Cases in Evidence, p. 703, the defendant's relations with a paramour were admitted in a charge of wife murder, as tending to show a motive for making away with the wife. Murder is frequently committed in an attempt to escape arrest or prevent the discovery of a former crime and, in such cases, the commission of the former crime may always be shown for the purpose of proving a motive for the murder charged in the indictment. *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052; *People v. Morse*, 196 N. Y. 306, 89 N. E. 816.

**§ 148. Evidence of Other Crimes to Prove Intent.**

"Intent is the purpose to use a particular means to effect such a definite result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, for-

gery, receiving stolen property and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent." *People v. Molineux*, 168 N. Y. 264, 297, *Richardson's Cases in Evidence*, p. 143; Editorial, *New York Law Journal*, March 14, 1927.

Whenever it becomes important to prove guilty knowledge in connection with the doing of a certain act, in order to negative the possibility of good faith in the transaction in question, it is proper to show that the prisoner has been guilty of similar offenses on prior occasions. Such evidence is admissible chiefly in prosecution for the following crimes, in which the state of mind of the accused is an important element of the crime:

1. Forgery;
2. Passing counterfeit coin;
3. Obtaining money or goods by false pretenses;
4. Receiving stolen property.

In prosecutions for any crime, whether felony or misdemeanor, in which "the gravamen of the offense is not in the doing of the deed, but in the faith in which it was done," evidence of other similar contemporaneous offenses is admissible on the issue of intent. *State v. Raub*, 103 Wash. 214, 173 Pac. 1094.

#### § 149. Forgery.

Where the defendant was charged with knowingly uttering a forged check, it was held competent, on the question of guilty intent, to prove other forgeries, not for the purpose merely of showing others, but to show thereby a guilty knowledge and intent. *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569. The case of *People v. Marrin*, 205 N. Y. 275, 98 N. E. 474, 43 L. R. A. (N. S.) 754, furnishes an excellent illustration. The defendant, an attorney, received from a client a sum of money to invest for her. He delivered to her a paper

purporting to be a mortgage executed by one James Cahill and acknowledged before the defendant as commissioner of deeds. It was shown that no James Cahill had ever been connected with the title to the property described in the mortgage. For the purpose of proving that "James Cahill" was a fictitious person and that the defendant had willfully falsely certified that the mortgage in question had been acknowledged before him, the prosecution showed that eight similar mortgages had been given by the defendant to the same client in return for money received for investment, and that the person named as mortgagor in each case was unknown and could not be found. This evidence was properly received for the purpose of showing the defendant's guilty intent. In a single isolated case the defendant might produce evidence tending to show that he had been misled into making the certificate by a person whom he honestly believed to be James Cahill. In order to prove knowledge, intention, and the impossibility of mistake, it was proper for the prosecution to show that the transaction in question was a part of a continuous scheme to defraud. "The common method, purpose and victim formed the connecting links which strung together the none successful efforts to defraud pursuant to a common scheme." See Editorial, *New York Law Journal*, March 14, 1927.

It is unnecessary, however, to prove an intent for each forgery before any one of them can be considered in relation to the forgery in controversy. *People v. Gerks*, 243 N. Y. 166, 153 N. E. 36, *Richardson's Cases in Evidence*, p. 240.

### § 150. Counterfeiting.

The mere uttering of counterfeit coin is not criminal. It is uttering with knowledge of the counterfeit that is the gravamen of the offense. And, for the purpose of showing guilty knowledge and intent, other utterances may be shown, for such other utterances negative inadvertence and other innocent explanations. The presumption of innocence lessens with every repetition of the act of passing counter-

feit money. *People v. Molineux*, 168 N. Y. 264, 297, 61 N. E. 286, *Richardson's Cases in Evidence*, p. 143.

**§ 151. Obtaining Property by False Pretenses and Representations.**

The argument for admitting other similar acts of obtaining money by false pretenses is the improbability of innocent intent, arising from the repetition; but evidence of other false representations, to be relevant, must tend to show a general design or plan to defraud or cheat. There must be shown a connection of features so strong as to indicate a system throughout them. *Mayer v. People*, 80 N. Y. 364. (Note: Obtaining property by means of verbal false representations as to the purchaser's ability to pay no longer constitutes a crime in this state. Penal Law, sec. 947; *People v. Whitney*, 146 App. Div. 98, 130 N. Y. S. 465). *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, *Richardson's Cases in Evidence*, p. 210.

**§ 152. Possession or Receipt of Stolen Goods.**

Where a defendant is charged with receiving stolen property, knowing it to have been stolen, evidence that the accused has received similar articles from the same thief, stolen from the same person or place, is relevant to show guilty knowledge. *People v. Grossman*, 168 N. Y. 47, 51, 60 N. E. 1050. But in *People v. Doty*, 175 N. Y. 164, 67 N. E. 303, *Richardson's Cases in Evidence*, p. 243, the Court held that the articles need not be stolen from the same owner, nor be of the same kind or class of property. The argument advanced is that the guilty intent to be proved might, under certain conditions, be as conclusively inferred from the dissimilarity of the articles as by their similarity. It must appear, however, that the articles had all been stolen by the same thief and that the thief had brought them all to the same receiver.

**§ 153. Evidence of Other Crimes to Negative Mistake or Accident.**

These are cases in which the defense of accident or mis-



take may be anticipated or in which the doubtful case of a particular death may be established by evidence of other previous similar deaths. Evidence of other similar crimes has been admitted for this purpose, chiefly in poisoning cases, to negative the possibility of accidental poisoning, but it is relevant only in cases in which the facts warrant a possible defense of accident or mistake and cannot be admitted on this pretext in cases where a felonious intent is the only possible inference that can be drawn from the circumstances of the poisoning. *People v. Molineux*, 168 N. Y. 264, 300 to 305, and cases there cited, 61 N. E. 286, *Richardson's Cases in Evidence*, p. 143.

**§ 154. Evidence of Other Crimes to Show Common Plan or Scheme.**

Evidence of other crimes is admissible to show a common plan or scheme. But to bring a case within the exception to the general rule which excludes other crimes, there must be some evidence of a general plan or system between the offense on trial and the one sought to be introduced. To illustrate: In *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, *Richardson's Cases in Evidence*, p. 1056, the defendant was convicted of the crime of arson in the third degree. The specific charge was that defendant had burned a barn belonging to the man by whom he had been employed as coachman and gardener. The defendant had been discharged from this position. A poisonous preparation had been kept in the barn for use in destroying insects in the garden. The defendant knew of this. Evidence was received to show that on the night of the fire and before it occurred, a span of horses, a pony and a cow had been poisoned and died. This evidence was held competent, as tending to prove that the injury to the animals was done by the incendiary and as a part of the same criminal scheme which resulted in the destruction of the barn. In *People v. Duffy*, 212 N. Y. 57, 105 N. E. 839, a police sergeant was convicted of bribery in collecting "hush money" from the proprietor of a gambling resort. Evidence was received



to show that the defendant received from his predecessor a list of gambling house proprietors in his precinct from whom "hush money" had been collected; that the complainant's name was on this list; that the persons listed had previously paid sums of money for police protection to the defendant's predecessor; and that they continued to pay them to the defendant. This evidence was held admissible as proof of a plan or scheme to commit a series of crimes, including the one on trial. In order to render evidence of other crimes competent under this exception, however, a very close relation of time, place, or circumstance must be shown between the other crimes sought to be proved and the crime charged, so that they can truly be said to be embraced in a single criminal scheme. In *People v. Grutz*, 212 N. Y. 72, 105 N. E. 843, L. R. A. 1915 D 229, *Richardson's Cases in Evidence*, p. 250, in which the defendant was on trial for arson, the prosecution attempted to show that the defendant and one Stein had entered into a conspiracy to induce persons to insure their property for the purpose of having it destroyed by fires which were to be set by Stein, and that the defendant was to attend to adjusting the losses and collecting the insurance. Evidence of nine other incendiary fires set by Stein in which the defendant was implicated was introduced. The Court of Appeals, however, held this evidence inadmissible on the ground that there was no such relation of time, place, or circumstance between them that the bare evidence of the origin of any of them tended to prove the origin of the fire in question. See, also, *Kelly v. Home Mutual Fire Ins. Co.*, 190 App. Div. 764, 180 N. Y. S. 657; *People v. Hassan*, 196 App. Div. 89, 187 N. Y. S. 115.

These rules apply whether the action be civil or criminal. In *Altman v. Ozdoba*, 237 N. Y. 218, 142 N. E. 591, the Court says: "In an action upon a promissory note against an indorser where the indorsement is alleged to be forgery, it is permissible to show that other indorsements upon the same or other notes linked to and part of the original transaction coming from the same person were also forgeries."

We think that both reason and authority justify that such evidence is competent. The fact that this is a civil case instead of a criminal prosecution plays no part. Where the signature is denied and claimed to be a forgery it is competent to show the whole plan and scheme of the man procuring and giving the notes and to give evidence establishing the forgery of all signatures and all endorsements. In the same way fraud in a civil case may be proved by circumstantial evidence. "Proof of fraud may sometimes be made by circumstantial evidence. Circumstances insignificant in themselves may acquire probative force as links in the chain of circumstantial proof." *Van Iderstine Co., Inc. v. Barnet Leather Co., Inc.*, 242 N. Y. 425, 152 N. E. 250.

#### **§ 155. Evidence of Other Crimes to Prove Identity.**

The fifth exception to the general rule excluding evidence of extraneous crimes is that, when the evidence of another crime tends to identify the person committing it as the same person who committed the crime charged, it is admissible. *People v. Hill*, 198 N. Y. 64, 91 N. E. 272, is in point. The defendant was on trial for murder. The prosecutor showed that a few days before the homicide this defendant had taken part in two burglaries in which three revolvers had been taken; that one of these revolvers was found in the hand of the deceased, where it had been placed to simulate suicide; that another was given by the defendant to a woman shortly after the murder; and that the third was found hidden in a cellar near which the defendant had been seen soon after the murder. The Court of Appeals held that evidence of the burglaries was admissible on the murder trial because it tended to identify the person who committed the burglaries as the one who committed the murder. See 3 A. L. R. 1540, note; *People v. Jung Hing*, 212 N. Y. 393, 106 N. E. 105.

#### **§ 156. Evidence to Show Malice.**

The rule of evidence in actions for defamation of char-

acter is beset with many complications as to the use of other utterances as evidence of malice. *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710. The New York Rule permits repetition of the same words or same charge in other words before the action was begun to be shown as bearing upon the degree of malice. *Distin v. Rose*, 69 N. Y. 122; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123. But repetition of such words after the action is begun is excluded. Subsequent utterances would show malice, but are excluded on the ground that they might aggravate the damages and at the same time constitute a second cause of action, in which case the defendant might be compelled to pay damages twice for the same injury. *Frazier v. McCloskey*, 60 N. Y. 337, 19 Am. Rep. 193; *Daly v. Byrne*, 77 N. Y. 182. So, too, evidence of utterances of a different nature is not allowed to show malice. Such evidence is excluded on the ground of unfair surprise and confusion of issues. In *Root v. Lowndes*, 6 Hill (N. Y.) 518, 41 Am. Dec. 762, the Court said:

“When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show those words have been spoken on a dozen different occasions (because the judgment bars all the instances of utterance and there is no surprise). But very different considerations arise when we come to actionable words which are not laid in the declaration. To admit the proof of such words must be a surprise upon the defendant. It cannot be supposed that he will be prepared to try a matter of which the plaintiff has not complained. That is not all. If the plaintiff may prove the words, the defendant may justify as to those words, and thus the court and jury will be led off from the point in controversy as presented by the pleadings, into the trial of an indefinite number of collateral issues.” See cases collected in 12 A. L. R. 1039, note.

### § 157. Knowledge or Belief—Evidenced by Conduct.

One's knowledge or belief may be of probative value in determining the question at issue, and this is ordinarily

established by conduct or by words. Wigmore on Ev., sec. 266, thus explains the principle: "Conduct and word-utterances may betray the knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the inner existence of that knowledge or belief. For example, A's act of boarding a railroad train is some evidence of his belief as to the destination of the train; B's act of taking a purse, found by him in the street, to the house of X, is some evidence that he knows or believes X to be the loser of the purse. So, also, for the verbal utterance; A's mention of Charles the Great or Roentgen rays or the Klondyke is some evidence that he knows or is aware of the existence of such a person, thing, or place." In *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, the defendant had asked whether they had found the whole of Dr. Parkman's body, thus indicating a knowledge that it had been cut up. The same general principle is applied in civil cases, as where evidence that a dog was usually kept chained and muzzled was admitted to show the owner's knowledge that it was fierce and dangerous. *Hahnke v. Friederich*, 140 N. Y. 224, 35 N. E. 487.

### § 158. Guilt—Evidenced by Conduct.

The mode of reasoning involved in evidencing guilt from conduct is in the inference of guilt from guilty conduct. The kinds of behavior indicating guilt are innumerable. They are as various and as changeable as are men's dispositions and emotions. While no conduct raises a conclusive inference, yet no conduct is entirely without significance. The jury may pass upon conduct as an inference of guilt. *Greenfield v. People*, 85 N. Y. 75, 86, 39 Am. Rep. 636, *Richardson's Cases in Evidence*, p. 254; *People v. O'Neill*, 112 N. Y. 355, 363, 19 N. E. 796; *People v. Willett*, 213 N. Y. 368, 386, 107 N. E. 707. Instances: The accused's reluctance to have his shoes measured, held admissible, *State v. Brown*, 168 Mo. 449, 68 S. W. 568; the defendant turned pale when arrested, admitted, *Lindsay v. People*, 63 N. Y. 143, 155;



a defendant, charged with wife murder, failed to shed tears the next morning, admitted, *Greenfield v. People*, *supra*; the defendant's readiness to deliver up on demand a hog, alleged to have been stolen, admitted, *Smith v. State*, 42 Tex. 444; the defendant's offer to marry the girl who charged him with rape, admitted, *People v. Elston*, 186 App. Div. 224, 174 N. Y. S. 1.

### § 159. Refusal to Undergo a Superstitious Test.

The police or interested persons often employ superstitious tests as a means of obtaining a clue to guilt, and a refusal to undergo such a test would properly be evidential of consciousness of guilt. This rule is well illustrated by a case reported in *Boston Transcript*, Feb. 21, 1894:

"B. G. was on trial for the larceny of \$365 from Simon Melnikoff, his lodging-house keeper. It will be remembered that when the crime was discovered seven persons who could possibly have taken the money were requested to step into a dark room in Melnikoff's house and touch a live hen fastened on a table. They were told that when the guilty party touched her she would make an outcry. Unknown to the men who entered the room the hen had been saturated with bluing. An inspection of the hands of the men who entered the room showed that all but Goldstein had touched the hen. His hands bore no marks of bluing, and when he was informed of the trick that had been played on him he said that he did not understand the condition of the test to be that he must place his hand on the hen. Judge Sherman admitted this testimony and in commenting on the weight it should have with the jury said: 'This test was not applied to determine who was guilty from the result of the thing itself, but it was believed that the guilty one, in the uneasy state of his conscience, would be overcome with dreadful superstition and avoid carrying out the test.'" *Wigmore on Ev.*, sec. 275.

### § 160. Flight, Escape, Resistance, or Concealment.

The inference raised by flight, escape, etc., is well summed



up by Wigmore on Ev., sec. 276: "Flight from justice, and its analogous conduct, have always in human experience been deemed indicative of a consciousness of guilt. The wicked flee, even when no man pursueth them; but the righteous are bold as a lion. It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself."

Such evidence is always admissible. *People v. Ogle*, 104 N. Y. 511, 514, 11 N. E. 53. But the weight which the jury is entitled to give to it depends upon the circumstances of the individual case. As stated by the Court of Appeals, in *People v. Fiorentino*, 197 N. Y. 560, 567, 91 N. E. 195: "Evidence of flight is competent because, when unexplained, it tends to show consciousness of guilt, although standing alone it raises no legal presumption thereof. When the crime is proved, but the identity of the criminal is in doubt, it bears somewhat on the question of identity. Ordinarily it is of slight value, and of none whatever unless there are facts pointing to the motive which prompted it, and, hence, any explanation of the accused should always be considered in connection therewith." See, also, *Alberty v. United States*, 162 U. S. 499, 508, 40 Law. Ed. 1051, 16 Sup. Ct. Rep. 864.

All attempts at falsehood, evasion and concealment by one accused of crime are admissible in evidence. *People v. Conroy*, 97 N. Y. 62, 80. But, as said by the Supreme Court of the United States: "They are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone requires." *Hickory v. United States*, 160 U. S. 408, 417, 40 Law. Ed. 474, 16 Sup. Ct. Rep. 327.

**§ 161. Subsequent Repairs as an Admission of Negligence.**

Evidence of repairs made after an accident, is not admis-

sible as an admission of negligence or culpability in causing the injury, because the inference is an unjust one and public policy forbids it. The reason for this exclusionary rule is well stated in *Morse v. Minneapolis & St. Louis Railway Co.*, 30 Minn. 465, 16 N. W. 358, quoted with approval in *Columbia Co. v. Hawthorne*, 144 U. S. 202, 36 Law. Ed. 405, 12 Sup. Ct. Rep. 591:

“A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.” This rule has been uniformly followed in the courts of this State. *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Getty v. Hamlin*, 127 N. Y. 636, 27 N. E. 399; *Rosen v. Chesebrough Bldg. Co.*, 189 N. Y. S. 131; *Fraumberg v. Schmohl*, 190 N. Y. S. 710.

Subsequent acts of repair may be shown, however, to indicate control, the inference being that the duty to make repairs rested upon the one who actually made them. But the jury should be instructed that the evidence is received for this purpose only and is not to be considered on the question of negligence, and furthermore, there must be a dispute as to the question of control. Evidence of this kind may not be submitted to the jury on the pretext of proving control when, in fact, control and duty to keep in repair are admitted either by the pleadings or upon the trial. Such evidence is rejected as irrelevant. *Bateman v. N. Y. C. & H. R. R. Co.*, 47 Hun 429; *Sprague v. Rochester*, 52 App. Div. 53, 64 N. Y. S. 846; *Clapper v. Town of Waterford*, 131 N. Y. 382, 30 N. E. 240.

## CHAPTER VI.

### CIRCUMSTANTIAL EVIDENCE (Continued)

#### Evidence to Prove Condition, Quality, Capacity, or Tendency of Material Objects

##### § 162. Classification.

The condition, quality, capacity, or tendency of a material object may be evidenced circumstantially by showing:

- I. Prior or Subsequent Condition.
- II. Condition of Part to Prove Condition of the Whole or another Part.
- III. Effect on Other Occasions.

##### § 163. I. Prior or Subsequent Condition.

In order to prove the condition of an object at a given time it is competent to show its condition at a prior or subsequent time where it appears that the condition at the time in question was substantially the same. The interval which may be permitted between the time in question and the time referred to in the testimony depends on the nature of the condition sought to be proved. For example, an accumulation of snow and ice on a pavement could not, from its nature, be presumed to remain in the same condition for even a few hours, whereas a defective roadbed would remain defective until it was repaired. Illustrations: the condition of a sidewalk a year before the accident was admitted, after proof that it was, during that time, substantially unchanged. *Hunt v. Dubuque*, 96 Iowa 314, 65 N. W. 319; condition of bridge-planking a few days after the injury was admitted in *Jessup v. Osceola County*, 92 Iowa 178, 60 N. W. 485; condition of stairs and mats two days after the accident was admitted in *Toland v. Paine Furniture Co.*, 179 Mass. 501, 61 N. E. 52; the condition of a mine several months after the accident, where it was shown to be substantially unchanged, was admitted in *Ar-*

ras v. Standard Plaster Co., 121 App. Div. 61, 105 N. Y. S. 440; evidence that machinery was out of repair three weeks before the accident was admitted in Reich v. Iron Clad Mfg. Co., 120 App. Div. 445, 104 N. Y. S. 1069. In Mansfield v. City of New York, 119 App. Div. 199, 104 N. Y. S. 386, evidence that awnings had been inspected seven years before the accident and reported in an unsafe condition, was held improperly excluded. See, also, McCulloch v. Dobson, 133 N. Y. 114, 123, 30 N. E. 641.

**§ 164. II. Evidence of Condition of Part to Prove Condition of Whole or of Another Part.**

The condition of one part may evidence the condition of another part, and, therefore, the whole may be evidenced by parts; but the parts should be so related as to form homogeneous parts of an entity including them both. The principle receives frequent application where the question in controversy is as to the condition of highways, machines, buildings, railway tracks, stations, and roadbeds. Where the plaintiff was injured by the fall of a telegraph line, the fallen condition at other near places and times was admitted to show the defective and negligent nature of construction. Randal v. N. W. Telegraph Co., 54 Wis. 140, 11 N. W. 419. See cases collected in 20 L. R. A. (N. S.) 665, note. Again, samples may be in evidence of the condition or quality of an entire lot or mass from which they were taken. But the mass from which the sample was taken must be substantially uniform with reference to quality. Thus, samples (two) of milk, taken by the inspector from the defendant's milk wagon on the same day and at substantially the same time, are competent to show the bad quality of milk. Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280, and in Schmitt v. Trowbridge, 21 Fed. Cases, 710, 712, the Court charged the jury as follows: "It is impossible for the government to count the matches in these boxes; but where we find one or two or a few boxes in a case overrunning, it is a fair presumption that all the boxes in the case over-run; and, where you find boxes in one case overrunning, it



is fair to be presumed that all the boxes in that class overrun; but it would not follow that if other matches were made of a different class, or if they were boxed differently, as if the boxes were differently shaped or of different sizes, they would all overrun; but here there were one hundred thousand boxes of a certain size, and of a certain quality of timber. And you find, in that number of boxes, that twenty or fifty boxes, indifferently chosen, overran, and none of them underran. It would be a fair presumption that the entire one hundred thousand would overrun." But where the plaintiff purchased from the defendant several barrels of tallow and used them, and there was no evidence that they were adulterated, and he subsequently bought another lot of twenty-two barrels, two of which were experimented on and found to be grossly adulterated, it was held that the jury could not be allowed to infer without further evidence that the remainder of the lot was likewise adulterated. *Meagley v. Hoyt*, 125 N. Y. 771, 26 N. E. 719, 36 N. Y. St. Rep. 27.

### § 165. III. Effect on Other Occasions.

The tendency of an object may be shown by other similar instances of the same effect under similar conditions. The cases illustrating this principle may be classified roughly according to the various kinds of tendencies and effects into four divisions as follows:

1. Other accidents from the same cause;
2. Similar effects on human health or property from identical causes;
3. Similar effects on the conduct of persons or animals on the same or other occasions;
4. Experiments.

### § 166. Other Accidents.

The general rule in this state is that where the conditions were the same, evidence of prior accidents is admissible both for the purpose of showing the dangerous condition of the object which caused the accident and to prove



that the persons responsible had notice of such condition. This rule is most frequently applied to cases where injuries have been sustained by reason of defective highways. Injuries sustained by others at the same place at about the same time, or at a time when the highway was in the same condition, may be proved for the purpose of showing the unsafe condition of the highway and notice thereof to those responsible for keeping it in repair. In the leading case of *Quinlan v. City of Utica*, 11 Hun 217, aff'd 74 N. Y. 603, *Richardson's Cases in Evidence*, p. 263, the plaintiff was permitted to prove that other persons had slipped and fallen, at various times, on the sidewalk where she was injured. It was shown that at all of these times the walk was in the same general condition that it was in when the plaintiff received her injuries. The ruling was sustained on the ground that the evidence was admissible as tending to show that the walk, tested by actual use, had been demonstrated to be in an unsafe and improper condition. The argument for admitting evidence of this nature was stated by the Court (p. 219) in the following language:

"Upon an issue as to the utility, proper condition, or safety of any work of human construction designed for practical use, evidence tending to show how the article has served when put to the use for which it was designed, would seem to bear directly upon the issue, and often may be of the most satisfactory and conclusive character. It is objected by the appellant's counsel that the testimony presented new issues, of which his client had no notice, and which it could not be prepared to meet. In one sense, every item of testimony material to the main issue introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue the defendant was required to be prepared for." See, also, *District of Columbia v. Armes*, 107 U. S. 519, 27 Law. Ed. 618, 2 Sup. Ct. Rep. 840; *Lundbeck v. City of Brooklyn*, 26 App. Div. 595, 50 N. Y. S. 421. In *Flansburg v. Elbridge*, 205

N. Y. 423, 98 N. E. 750, a witness for the plaintiff testified that in the month of December, when the road was covered with ice, his sleigh had overturned near the place where the plaintiff was injured. As the plaintiff met with his injury by having his horse and wagon slip over the embankment on a rainy night in September, the Court of Appeals held that the evidence was improperly received because the prior accident had occurred under conditions wholly dissimilar to those attending the accident to the plaintiff.

In Massachusetts and several other jurisdictions evidence of prior accidents is rejected on the ground that it raises collateral issues. See cases collected in 32 L. R. A. (N. S.) 1112, note.

In New York some of the cases place considerable emphasis on the fact that the object which caused the injury in question had been in the same condition for a long period and no similar accident had occurred. In *Hubbell v. City of Yonkers*, 104 N. Y. 434, 439, 10 N. E. 858, 58 Am. Rep. 522, *Richardson's Cases in Evidence*, p. 261, the Court argued as follows:

"The very fact that for ten years or more, this embankment had been in the same condition, and that, so far as appears, no similar accident had occurred, is most cogent evidence of the lack of any negligence on the part of the city in failing to guard this spot. It is upon this principle that several cases have been decided in this court, even with reference to carriers of passengers, in which case the law exacts a higher degree of care than it does in the case of municipal corporations in relation to their highways. That which never happened before, and which in its character is such as not to naturally occur to prudent men, to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing the possible happening and guarding against that remote contingency."

See, also, *Butler v. Village of Oxford*, 186 N. Y. 444, 79 N. E. 712; *Atwood v. Met. St. Ry. Co.*, 25 Misc. 758, 54 N. Y. S. 138; *Boutet v. City of New York*, 199 App. Div. 835,

192 N. Y. S. 608. In most other jurisdictions negative evidence of this kind is excluded. In the case of *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260, the plaintiff was injured by falling into an area or cellar-way which was left unguarded at night. The defendant offered to prove that ten thousand persons had passed this area every year without accident. The argument against the admission of such evidence is ably expressed in the opinion of the Court:

"The reason for excluding all evidence of this character is, that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of the time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved. The evidence excluded furnishes a forcible illustration of the necessity of the rule, to the trial of causes before juries. The offer was to show that ten thousand persons passed these premises in each year since the hall was erected, without accident. The admission of this evidence would carry with it the right to cross-examine as to the circumstances under which each individual of the multitude passed, and the degree of caution and circumspection used by each; and, also, the right to introduce evidence of the dangers encountered, and by the exercise of superior vigilance, avoided, by each one of these individuals, together with evidence that some one or more of them had met with accidents at the place; in turn opening the way for evidence as to the degree of care exercised by such as had not been so fortunate as to escape; and when the parties, wearied in their endeavors to exhaust this vast field of investigation, rested the cause, the judge would have been compelled to direct the jury to determine whether or not the area was a nuisance, from the character of the footway, the situation of the area with reference to it, and the means taken to guard against accident from its proximity to the sidewalk."

See cases collected in 32 L. R. A. (N. S.) 1161, note.

In negligence cases other than those arising from accidents due to defective highways, the rule as to the admis-

sion of evidence of other accidents must be applied with the utmost caution, for the reason that it is ordinarily extremely difficult to show that the conditions were exactly the same as the two occasions and that the accident was caused in each case by the same defect. *Harrison v. N. Y. C. & H. R. R. R. Co.*, 195 N. Y. 86, 87 N. E. 802.

### § 167. Fires Caused by Locomotives.

An important group of cases in which evidence of similar occurrences on other occasions is sometimes admitted is that of actions for fires caused by sparks from locomotives. First—Same Locomotive. If the cause of the fire is in controversy and the particular locomotive alleged to have caused it is identified, evidence of spark emissions on other occasions is admissible to show the capacity of that particular engine to emit igneous matter far enough to set fire to the premises in question. *Hinds v. Barton*, 25 N. Y. 544. In order to permit evidence of other spark emissions at a time somewhat remote from the fire in question, however, it must first be shown either that such sparks were emitted through faulty construction of the engine, or that the engine was in the same condition of repair that it was in when the fire occurred. *Collins v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 243, 249, 16 N. E. 50, *Richardson's Cases in Evidence*, p. 266. Second—Other Locomotives. Early and leading cases in the Court of Appeals have held that where the plaintiff claims that a fire was started by a locomotive of the defendant company, but does not specify any particular one, evidence that engines of the company passing near the place emitted sparks on other occasions is admissible after evidence has been introduced by the plaintiff tending to exclude the probability that the fire was started by any other means. *Sheldon v. Hudson River Railroad Co.*, 14 N. Y. 218, 67 Am. Dec. 155, *Richardson's Cases in Evidence*, p. 269; *Field v. N. Y. C. R. R. Co.*, 32 N. Y. 339. The argument for admitting such evidence is well stated in *Dunning v. Maine Central R. R. Co.*, 91 Me. 87, 39 Atl. 352.



"It is admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same tracks, at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals, so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. If the possibility be proved, other facts and circumstances may lead to a probability, and then to a satisfactory proof." Later cases in the Appellate Division, however, show a strong tendency to exclude evidence of this kind whenever the prerequisite requirements for its admission are not strictly complied with. In *Chandler v. Rutland R. R. Co.*, 140 App. Div. 68, 124 N. Y. S. 1046, the Court pointed out that, where the plaintiff charges negligence upon the claim that the offending engine was out of repair rather than that it was of improper construction, evidence of spark emissions by other engines can have no bearing on the case whatever and is inadmissible. In *Buhrmaster v. N. Y. C. & H. R. R. Co.*, 173 App. Div. 62, 158 N. Y. S. 712, *Richardson's Cases in Evidence*, p. 273, the plaintiff claimed that his barn was burned by means of sparks thrown from the defendant's freight train but offered no direct evidence of the fact. The defendant showed that no freight train passed within a considerable time of the fire. An appeal was taken on the ground that trial court excluded testimony that other engines had thrown sparks an equal distance. The Appellate Division expressed the following opinion:

"We think the ruling of the court, postponing the receipt of this line of evidence until there was evidence in the case which would show some connection, does not raise the issue attempted to be asserted at this time. But if it does we are persuaded that the authority relied upon (*Sheldon v. Hudson River Railroad Co.*, 14 N. Y. 218) is not controlling at this time. That determination was made in the primitive



days of railroading, in 1856, when the engines were known by name, and when there was only one type in common use, and all were equipped substantially alike, and evidence of what these engines usually did under ordinary conditions was a very different thing from taking the testimony today, with the great variety of engines in use, and particularly when it is not shown that the conditions were the same when the alleged sparks were thrown a greater distance. Obviously, with the wind blowing a gale, a defective engine might have thrown sparks which would be carried alive a distance of several hundred feet, while another engine, in good condition and in a comparatively light wind, would not throw off sparks of any danger whatever; and so the mere fact that some witness had found large sparks a considerable distance from the line of the railroad would prove nothing in value in determining whether the fire in question was lighted by a spark from an engine in passing."

Obviously, some theory of negligence must be advanced and proved in every case, as the mere fact that the plaintiff's property was damaged by fires set by sparks from one of the defendant's engines is not sufficient to charge the defendant with negligence. The plaintiff must go further and show by some means that the defendant failed in its duty to use the best spark arresters in known practical use or that the engine which caused the damage was out of repair. *Flinn v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 11, 36 N. E. 1046.

### § 168. Effects on Health or Property.

The effect of drugs, poisons, gases, impure food, air, etc., upon animal or plant life may be evidenced by proof of their effect upon other animals or plants under the same conditions. An excellent discussion and review of cases on this point is contained in *Shea v. Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123. In that case the plaintiff, who claimed to have been poisoned by inhaling lead dust in defendant's mill, was allowed to introduce evidence to show that other employees in the mill had become ill from

the same cause. Again, where it was alleged that escaping gas caused illness of the plaintiff, the court admitted evidence of the good health of members of plaintiff's family up to the time when gas began to escape into his house, and that soon thereafter every member of his family became seriously ill. But sickness of others living in the plaintiff's neighborhood, alleged to be due to escaping gas, was excluded because the attending circumstances might be so different that the occurrence of sickness in one house would have no tendency to prove the cause of illness in the occupants of another. *Emerson v. Lowell Gas Co.*, 3 Allen (Mass.) 410; *Hunt v. Lowell Gas Co.*, 8 Allen (Mass.) 169, 85 Am. Dec. 697. In *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, the plaintiff, in an action for damage to his shade trees caused by escaping gas from the defendant's main, was permitted to testify as to the condition of other shade trees upon the street beyond his place after the construction of the defendant's gas line.

### § 169. Effects on Conduct of Persons or Animals.

The chief instance in which the conduct of others similarly situated is used to evidence the effect of an object upon the conduct of a person or an animal is in the case of objects tending to cause fright. To illustrate: The use of other instances of fright by horses at a particular object—a flag, a pile of stones, a wheel, a pile of lumber—as evidence of its tendency to frighten other horses, is permissible. *Champlin v. Village of Penn Yan*, 34 Hun 33, 37, aff'd 102 N. Y. 680; *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611, *Richardson's Cases in Evidence*, p. 277; *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970. Again, where the question is as to whether plaintiff acted prudently under certain extraordinary conditions, the conduct of others in the same situation, having an interest to take the lesser and avoid the greater hazard, is competent evidence on the question of reasonable care and prudence. Thus, the conduct of others in jumping from a train, and the screams of other passengers in a car, just before a collision, were admitted

to show the plaintiff's state of mind before jumping from the car. *Twomley v. Central Park N. & E. R. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162.

### § 170. Experiments.

Upon the same general principles above discussed, the use of mental impressions resulting from experiments or tests, as indicating the nature or tendency of an object, is allowed in most jurisdictions, but is disapproved in New York. Thus, tests as to whether a thing could be seen or heard, or a person identified, under given circumstances of time and place, are ordinarily rejected. The evidence of tests in such cases is rejected because it is practically impossible to prove that the tests were made under exactly similar conditions as to light, sound, atmospheric conditions, etc. If it should be satisfactorily established that the tests, in every particular, were made under like conditions that prevailed at the time in question, the tests would be competent and admissible. *Yates v. People*, 32 N. Y. 509, 511, *Richardson's Cases in Evidence*, p. 278; *Bretsch v. Plate*, 82 App. Div. 399, 81 N. Y. S. 868; *People v. Fiori*, 123 App. Div. 174, 108 N. Y. S. 416; *Green v. Long Island R. R. Co.*, 131 App. Div. 277, 115 N. Y. S. 590; *People v. Neupert*, 190 App. Div. 929, 179 N. Y. S. 941.

The fact, that bloodhounds followed a trail to the defendant, has been held admissible against him where a proper foundation was laid. This foundation must include evidence that these bloodhounds were trained to trail human beings, that they had on other occasions successfully trailed human beings, and that they were laid on the trail at the place where the guilty party had been. *Hargrove v. State*, 147 Ala. 97, 41 So. 972; *State v. Dickerson*, 77 Ohio State 34, 82 N. E. 969.

For a general discussion as to the admissibility of tests and the conflict of authorities, see 8 A. L. R. 11, note.

## CHAPTER VII.

### BURDEN OF PROOF

#### § 171. Burden of Proof Defined.

The burden of proof is the obligation which rests on one of the parties to an action to convince the jury of the truth of a proposition which he has affirmatively asserted by the pleadings. "When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon the party who alleges the fact to establish it by proof." *Kay v. Met. St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751. To illustrate: A sues B on an express contract. B puts in a general denial. This presents the simplest possible case. Obviously, A must convince the jury of the truth of his assertion that B entered into a valid contract with him. If A fails in this, the verdict must be in favor of B, though B offers no evidence whatever. Suppose, however, B does not deny the contract but puts in a defense of payment. Then, if no evidence is offered on either side, or if the evidence on both sides is evenly balanced, A must win, because B has admitted the making of the contract, and the burden is on B to prove his affirmative defense of payment.

#### § 172. Burden of Proof Never Shifts.

The burden of proof never shifts from one party to the other. The confusion apparent in many of the cases arises from the fact that the term "burden of proof" is frequently misused by our Courts, when what is really meant is the duty of going forward with the evidence at any given stage in the trial. Thus, in the first simple illustration given above, we have seen that the burden is on A to prove that a valid contract was made. Suppose A testifies to a conversation between him and B in which A offered to sell and B agreed to buy four barrels of cement at twelve dollars per barrel. A then proves B's breach of the contract and his damage, and rests, having made out a *prima facie* case.



The duty is now on B to go forward with evidence and controvert A's *prima facie* case. Suppose B attempts to show that in the conversation referred to he had merely told A that he would be glad to have him submit samples of cement at that figure. If no more evidence is introduced, the case goes to the jury with the charge that unless, in the opinion of the jury, A has sustained the burden which he carried throughout the trial, a verdict must be returned for B. *Doheny v. Lacy*, 168 N. Y. 213, 220, 61 N. E. 255, *Richardson's Cases in Evidence*, p. 886.

The great importance of charging the jury correctly with respect to the burden of proof in every case lies in the rule that whenever at the end of a trial the evidence is in equilibrium, the verdict must be against the party who has the burden of proof. *Kay v. Met. St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751.

### § 173. Determined from Necessary Allegations of Pleadings.

It is said that which party has the burden of proof on any issue can always be ascertained from the pleadings; but this is strictly true only if we look to the necessary allegations of the pleadings and disregard unnecessary allegations. A confusion often arises due to the fact that matters are frequently pleaded in defense which are not strictly affirmative defenses and which may be proved under a general denial. To illustrate: A sues B on his promissory note. B puts in a defense of forgery or material alteration. In such case the burden is on the plaintiff to prove that the note in its existing conditions, as sued upon, is a valid obligation of the defendant. B might prove under a general denial that the note was a forgery or had been altered and, therefore, his allegations in the answer to that effect are superfluous and should be disregarded. *Farmers' Loan and Trust Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358, *Richardson's Cases in Evidence*, p. 281; *Dougherty v. Salt*, 227 N. Y. 200, 203, 125 N. E. 94.



### § 174. Burden of Proof on Plaintiff.

As a general rule, the pleadings are so framed as to cast upon the plaintiff the burden of proof. He ordinarily becomes the actor and must take the initiative, otherwise his action would fail. The pleadings are generally drawn in the affirmative because a negative does not admit of as direct and simple proof as an affirmative. Occasionally complaints are drawn in the negative, but this does not relieve the plaintiff from proving his negative assertions. The action of malicious prosecution affords a good illustration of a negative proposition. In such a case the plaintiff must allege and prove that the prosecution was without reasonable and probable cause. *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695. Other instances of claims based on negative facts: proper care had not been used, *Heinemann v. Heard*, 62 N. Y. 448; a note had not been taken in payment for an antecedent debt, *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397; goods were not according to warranty, *Dorr v. Fisher*, 1 Cush. (Mass.) 271; goods entrusted to a common carrier had not been delivered, *Roberts v. Chittenden*, 88 N. Y. 33.

### § 175. Burden of Proof on Defendant.

If the defendant admits the alleged facts of the plaintiff, but sets up other facts as a defense, the burden of proof is upon the defendant because he raises the only facts in issue. This is known as confession and avoidance. *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 32 N. E. 1076; *Conner v. Keese*, 105 N. Y. 643, 11 N. E. 516. The plaintiff is relieved of the proof of his facts because the defendant admits them. Thus, in an action on a promissory note, if the defense of payment is pleaded, the burden of proof is upon the defendant to prove payment, for he admits what the plaintiff would otherwise have to prove to make out a *prima facie* case. *Stokes v. Stokes*, 155 N. Y. 581, 50 N. E. 342. Again, in an action on a contract, the defendant may admit the execution of the contract, but set up some independent fact as a defense. Thus, the defendant in an action on an

insurance policy may admit the formal execution and issuance of the policy, and allege at the same time a breach of a condition which vitiates it. In such cases, the burden of proof is on the defendant to prove a breach of the condition. *Murray v. New York Life Ins. Co.*, 85 N. Y. 236; *Majestic Coal Co. v. Bush*, 171 N. Y. S. 662. The burden of proof has also been held to be on the defendant where the complaint alleges the wrongful removal of plaintiff's yacht by the defendant and the subsequent sinking of the yacht, and the defendant pleads by way of justification authority to move the yacht. *Blunt v. Barrett*, 124 N. Y. 117, 26 N. E. 318.

#### **§ 176. Unliquidated Damages.**

If an action is for unliquidated damages and the defendant puts in an affirmative defense, the weight of authority seems to hold that the plaintiff has the burden of proof, as the amount recoverable is not admitted upon the pleadings, and the plaintiff, therefore, must prove his damages as a part of his case. *Tallmadge v. Press Pub. Co.*, 60 Hun 605, 14 N. Y. S. 331, *aff'd* 131 N. Y. 565, 30 N. E. 66.

#### **§ 177. Burden of Proof in Criminal Cases.**

The burden of proof in criminal cases rests upon the prosecution and remains there throughout the trial. This is true in every case, irrespective of the nature of the defense. *People v. Downs*, 123 N. Y. 558, 25 N. E. 988, *Richardson's Cases in Evidence*, p. 284; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

#### **§ 178. Facts Peculiarly Within Knowledge of Adverse Party.**

It is an elementary rule "that when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." *Greenleaf on Ev.*, 16th Ed., sec. 79; *Bennett v. Edison Electric Illuminating Co.*, 26 App. Div. 363, 49 N. Y. S. 833, *aff'd* 164 N. Y. 131, 58 N. E. 7.

But the rule has no application to an affirmative allegation. *Bentley v. Bentley*, 7 Cow. (N. Y.) 701. The rule has frequent application in prosecutions for selling liquor, carrying concealed weapons, or doing other acts without the license required by law. Where one is charged with selling liquor without a license, and contrary to the statutes, and a license would be a complete defense, the weight of authority holds that the burden is upon the defendant to prove his license, because it is a fact clearly within his own knowledge. *Potter v. Deyo*, 19 Wend. (N. Y.) 361; *People v. Maxwell*, 83 Hun 157, 31 N. Y. S. 564; *People v. Willi*, 109 Misc. 79, 179 N. Y. S. 542. This rule is based entirely upon convenience, the argument being that the defendant, if licensed, can produce his license without the slightest inconvenience, whereas the proof of the negative, if required, would be extremely difficult. With the exception of this line of cases, the general rule is that "where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged." *Greenleaf on Ev.*, 16th Ed., sec. 80; *People v. Pease*, 27 N. Y. 45; *Beattie v. Beattie*, 83 Hun 295, 31 N. Y. S. 936, *aff'd* 153 N. Y. 652, 47 N. E. 1105.

### § 179. Measure of Evidence in Civil and Criminal Cases.

The rule is now well settled that the party having the affirmative of the issues in a civil action has the burden of proving the issue by a fair preponderance of the evidence, whereas in a criminal case the prosecution is required to prove the defendant's guilt beyond a reasonable doubt in the minds of the jury. The difficulty is in arriving at a practical working definition of these convenient phrases. The following simple definition of "reasonable doubt" contained in a jury charge has been approved by the Supreme Court of the United States.

"A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty and believe that you are acting in a reasonable manner and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit." *Holt v. United States*, 218 U. S. 245, 54 Law. Ed. 1021, 31 Sup. Ct. Rep. 2. See, also, *People v. Barker*, 153 N. Y. 111, 47 N. E. 31. The Court of Appeals, in a recent case, defined the burden which must be sustained by the prosecution in a criminal case as follows:

"The rule is that all evidence, when considered by the jury, must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of the defendant's guilt. The evidence of facts and circumstances, in order to justify a conviction, must all be consistent with and point not only to the guilt of the defendant, but they must be inconsistent with his innocence." *People v. Trimarchi*, 231 N. Y. 263, 267, 131 N. E. 910; Editorial, *New York Law Journal*, November 1, 1926.

In a civil action the jury should be instructed as to which party has the burden of proof, and further charged that unless that party has succeeded in convincing the jury of the truth of his cause by a fair preponderance of the evidence, the verdict must be against him.

A "fair preponderance of the evidence" is not necessarily controlled by the number of witnesses. Thus, the testimony of one witness for the plaintiff may make a greater appeal to the minds of the jurors than that of ten witnesses for the defendant. The "preponderance" or "weight" of the evidence is, therefore, governed by the credibility of the witnesses. *Schargel v. United Electric Light and Power Co.*, 127 Misc. 24, 215 N. Y. S. 217; *Peltier v. Chicago, St. P., M. & O. Ry. Co.*, 88 Wis. 521, 60 N. W. 250; *Kurz v. Doerr*, 180 N. Y. 88, 72 N. E. 926. It is sufficient to prove



the issue by a fair preponderance of the evidence in all civil cases, even though the evidence tends incidentally to prove the defendant guilty of arson, embezzlement, or any other crime; and the same rule applies to a civil action by the state to recover a penalty. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820, *Richardson's Cases in Evidence*, p. 288; *Barfield v. Britt*, 47 N. C. 41, 62 Am. Dec. 190.

### **§ 180. Right to Open and Close.**

In the absence of a statute or a rule of practice, the burden of proof carries with it, incidentally, the right to open and close. That is, the party who has the burden of convincing the jury has the right to open and close his case by way of adducing evidence and argument in support of his contention. This is a legal right and a denial thereof by the court may be excepted to and the ruling reviewed upon appeal. *Lake Ontario National Bank v. Judson*, 122 N. Y. 278, 25 N. E. 392; *Heilbronn v. Herzog*, 165 N. Y. 98, 101, 58 N. E. 759; *Millerd v. Thorn*, 56 N. Y. 402.

## **BURDEN OF PROOF IN SPECIFIC INSTANCES**

### **§ 181. Alleging Non-Payment.**

Upon the question as to who has the burden of proof when the complaint alleges non-payment of money, the authorities are in confusion. Thus, in an action on a contract, if the plaintiff alleges non-payment, is the burden of proof upon him to prove the non-payment, or is it upon the defendant to prove payment? Apparently, the burden of proof is upon the defendant, for the allegation of non-payment was unnecessary. The plaintiff need prove only the contract and its breach at maturity, as the presumption of non-payment continues until met with proof of payment. Payment is an affirmative defense, and the burden of proving it is upon the defendant. Editorial, *New York Law Journal*, January 24, 1925. But in certain actions at law, not based upon contract, an allegation of non-payment is



necessary, and the burden of proving the negative is upon the plaintiff, as it is an essential part of his cause of action. *Lent v. New York and Mass. R. R. Co.*, 130 N. Y. 504, 29 N. E. 988. The authorities relating to the burden of proof as to payments are fully collated and discussed in *Conkling v. Weatherwax*, 181 N. Y. 258, 73 N. E. 1028, *Richardson's Cases in Evidence*, p. 292. In that case the action was brought to establish and enforce a legacy as a lien upon real property. The defendant alleged in her answer that the legacy had been paid. There was no witness competent to testify for the plaintiff to show that the legacy had not been paid. Therefore, the question of burden of proof became of primary importance, since, if the plaintiff had the burden of proving non-payment, she must fail in her action, whereas if the burden was on the defendant to prove payment, the plaintiff might win. The Court of Appeals held that the burden of proof was on the plaintiff in this case and attempted to harmonize the authorities by laying down the following rules as to alleging and proving payment:

1. In an action upon contract for the payment of money only, where the complaint does not allege a balance due over and above all payments made, it is sufficient for the plaintiff to allege and prove a breach of the obligation by the non-payment of it when it matured, as the presumption of non-payment continues until met by the allegation and proof of payment.

2. When the complaint sets forth a balance in excess of all payments, owing to the structure of the pleading, it is necessary for the plaintiff to prove the allegation as made, and this leaves the amount of the payments open to the defendant under a general denial.

3. When the action is not upon contract for the payment of money, but is upon an obligation created by operation of law, or is for the enforcement of a lien where non-payment of the amount secured is part of the cause of action, it is necessary both to allege and to prove the fact of non-payment. See, also, *Noah v. Bowery Savings Bank*, 225 N. Y. 284, 122 N. E. 235. In an action upon a judgment the

burden of proof is on the defendant to establish payment of the judgment. *Dowling v. Hastings*, 211 N. Y. 199, 105 N. E. 194.

### § 182. Negligence Cases.

In all actions of negligence, the burden of proof on the issue of the defendant's negligence is upon the plaintiff. And this is true, even though the plaintiff may establish his cause of action by the aid of a legal presumption. *Kay v. Met. St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *Caspar v. Dry Dock E. B. & B. R. R. Co.*, 56 App. Div. 372, 67 N. Y. S. 805. Except where otherwise specially provided by statute, the plaintiff also has the burden of proving his own freedom from contributory negligence as a part of his affirmative case. *Weston v. City of Troy*, 139 N. Y. 281, 34 N. E. 780; *Camardo v. New York State Railways*, 247 N. Y. 111, 159 N. E. 879. The Labor Law, sec. 202a, provides that: "On the trial of any action brought by an employee or his personal representative to recover damages for negligence arising out of and in the course of such employment, contributory negligence of the injured employee shall be a defense to be so pleaded and proved by the defendant." *Hall v. N. Y. Telephone Co.*, 220 N. Y. 299, 115 N. E. 704.

The Civil Practice Act, sec. 265, provides that: "On the trial of an action to recover damages for causing death, the contributory negligence of the person killed shall be a defense to be pleaded and proven by the defendant." *Nicholson v. Greeley Square Hotel Co.*, 227 N. Y. 345, 125 N. E. 541; *Castle v. Director General of Railroads*, 232 N. Y. 430, 134 N. E. 334.

With these two statutory exceptions, the common law rule still applies to all negligence actions. In all negligence cases, therefore, except actions by employees against their employers and actions for negligence causing death, the burden of proof is on the plaintiff to establish both the defendant's negligence and his own freedom from contributory negligence.

### § 183. Bailments.

In bailment cases, when negligence is alleged, the burden of proof is upon the bailor. This is true in all classes of bailments and irrespective of the subject matter of the bailment. But the duty of adducing evidence may shift from bailor to bailee, and from bailee to bailor. One must here distinguish between the burden of proof and a *prima facie* case. "Proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury." *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532, 538, 45 Am. Rep. 268; *Goldstein v. Pullman Co.*, 220 N. Y. 549, 116 N. E. 376. The establishment of a *prima facie* case by the plaintiff does not shift the burden of proof to the defendant, but shifts only the duty of adducing evidence. After the defendant has introduced evidence explaining the destruction, loss, or injury to property, it is still for the jury to determine, upon all the evidence, whether the plaintiff, by a preponderance of evidence, has made out his case. What constitutes a *prima facie* case of negligence is not so much a question of evidence as it is of substantive law. *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, *Richardson's Cases in Evidence*, p. 310; *Wilson v. Christal*, 187 App. Div. 660, 176 N. Y. S. 341; *Kohlsaas v. Parkersburg & M. Sand Co.*, 266 Fed. Rep. 283. The return of the property in a damaged condition may raise a presumption of negligence, under certain circumstances, which, unexplained or unexcused, would entitle the bailor to recover, but this presumption of negligence does not shift the burden of proof to defendant. It shifts only the burden of adducing evidence that he was not guilty of negligence. *Wintringham v. Hayes*, 144 N. Y. 1, 6, 38 N. E. 999, 43 Am. St. Rep. 725.

### § 184. Fraud, Duress, and Undue Influence.

The earlier cases in this state held consistently that

fraud, duress, and undue influence are affirmative defenses which must be pleaded, and that the burden of proof is upon the party alleging such defenses. *Sperling v. Boll*, 10 App. Div. 290, 41 N. Y. S. 889; *Swift v. Poole*, 172 App. Div. 10, 157 N. Y. S. 928; *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. 255; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165. But in *Murray v. Narwood*, 192 N. Y. 172, 84 N. E. 958, *Richardson's Cases in Evidence*, p. 299, the Court of Appeals laid down a different rule covering these cases; viz., that when a party sues upon a contract, he must sustain the burden of proving a contract valid in its inception. In that case the plaintiff sued upon a written agreement to compromise and settle a suit. The answer denied the material allegations of the complaint and alleged illegality of agreement, conspiracy, fraud, and duress. In the language of the Court (p. 177): "The defenses of conspiracy and duress were in reality and in substance negative, in effect alleging that there was no legal contract and that it never had a valid inception. These defenses pertain to the facts which took place at the time the contract was alleged to have been executed, and become the *res gestae*, upon which the validity of the contract depends. This class of cases is distinguishable from those affirmative defenses which are based upon facts occurring subsequently to the execution of a contract, in which it may be changed, altered, modified, or settled. It, therefore, follows that the plaintiff, in undertaking to prove the contract upon which his action is based, had cast upon him the burden of establishing, by a preponderance of evidence, that it was a good and valid contract having a legal inception which was binding upon the defendant, and that burden of proof continued with him throughout the case."

Where a release is set up by the defendant in a personal injury action and the plaintiff by his reply enters a denial claiming that the release was secured under the misrepresentation that it was a receipt for wages, the burden of establishing the defense rests on the defendant. *Box-*



berger v. N. Y., N. H. & H. R. R. Co., 237 N. Y. 75, 142 N. E. 357.

### § 185. Illegality of Consideration.

It has been frequently held that when a contract is attacked on the ground of its illegality, the rule of pleading depends upon whether the illegality is apparent on the face of the complaint or necessarily appears from the plaintiff's evidence. If it does so appear, the defendant may take advantage of it under a general denial. But if the contract is valid on its face, the defendant must affirmatively plead and prove his defense of illegality. *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am. St. Rep. 454; *Quast v. Fidelity Mutual Life Ins. Co.*, 226 N. Y. 270, 123 N. E. 494. Since the rule of pleading ordinarily carries with it the burden of proof, the authorities have consistently held that if a contract, valid on its face, is attacked on the ground of its illegality, the burden of proving such illegality rests upon the party asserting it. Thus, if the plaintiff sues on a note and the defendant pleads that the note was given for an illegal consideration, in that it was usurious or given for a gaming and wagering contract or for any other purpose prohibited by statute or condemned by law as against public policy, the burden of proof is upon the defendant. *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Bennett v. Covington*, 22 Fed. Rep. 816; *Pratt v. Langdon*, 97 Mass. 97, 93 Am. Dec. 61; *Chandler v. Lack*, 73 Okla. 285, 170 Pac. 516, 14 A. L. R. 461. Although these cases have never been overruled, they are apparently in conflict with the reasoning of the Court of Appeals in the case of *Murray v. Narwood*, 192 N. Y. 172, 84 N. E. 958, *Richardson's Cases in Evidence*, p. 299.

### § 186. Burden of Proof as to Want of Consideration.

A majority of the authorities in this state hold that when the defense to an action on an instrument is want of consideration the burden of proof to show the existence of consideration is upon the plaintiff. *Irving v. Irving*, 90



Hun 422, 35 N. Y. S. 744; *Mechanics & Metals National Bank v. Termini*, 93 Misc. 1, 156 N. Y. S. 433; *Bank of Coney Island v. Weinberg*, 190 N. Y. S. 203; *Delano v. Bartlett*, 6 Cush. (Mass.) 364. In *Irving v. Irving*, *supra*, the plaintiffs sued on a promissory note and the defendant set up want of consideration as a defense. Upon the question of the burden of proof the Court said at p. 425: "Upon the plaintiffs rests the burden of proving a valuable consideration. The production of the note by presumption of law, accomplishes that result in the first instance; yet, when the defendant has offered evidence in rebuttal of this presumption, the burden rests upon the plaintiff of sustaining by further proof the allegation of value. And when the tribunal which is to pass upon the evidence approaches its consideration, it does so with the rule of law in mind, and controlling its action, that the burden of establishing the consideration rested upon the plaintiff throughout the trial and that from all evidence, it must appear that he has met the burden to entitle him to recover."

Again in *Abrahamson v. Steele*, 176 App. Div. 865, 163 N. Y. S. 827, the Appellate Division said by way of dictum, "The expression in certain cases, to the effect that the burden of proving the defense of lack of consideration is upon the defendant, is loose, and has occasionally tended to mislead. What is meant is that the burden of producing or coming forward with proof of lack of consideration is upon the defendant. In other words, in default of any such proof, the plaintiff is entitled to judgment upon the presumption raised by law. Where such proof is introduced, the burden of proof on this issue, upon the whole case, remains with the plaintiff."

The Appellate Term recently took a contrary view in *James Conforti Construction Co., Inc. v. Neek Realty Corp.*, 125 Misc. 876, 212 N. Y. 393. Referring to the problem of burden of proof, where the action was upon a promissory note, the defense to which was a failure of consideration, the court held that the burden of proof was upon the defendants; and that, therefore, they had the right to open

and close. Viewing the authorities, as divided, the Court adopted the position more in harmony with commercial usage. It would seem, however, that the majority view, holding that the burden of proof in such a case is on the plaintiff, is more logical and more in harmony with the general rule as to the burden of proof in contract cases. Consideration is certainly an essential to the valid inception of a contract, and it is well established under *Murray v. Narwood*, 192 N. Y. 172, 84 N. E. 958, that when a party sues upon a contract, he must sustain the burden of proving a contract valid in its inception.

### § 187. Burden of Proof as to Notice.

Where a notice is necessary as a condition precedent to a right of action the burden of proof on the issue of notice remains throughout the whole case on the party whose obligation it is to give the notice. The burden of going forward with evidence may shift upon the introduction of evidence that a notice by letter, properly addressed, was sent to the addressee. A denial of the receipt of the notice creates merely a disputable inference of fact for the jury. *Bloch v. Eastern Machine Screw Corporation*, 281 Fed. 777.

### § 188. Infancy.

The burden of proving infancy is upon the party seeking to take advantage of it. *Garbarsky v. Simkin*, 36 Misc. 195, 73 N. Y. S. 199.

### § 189. Contract of Employment—Discharge.

In an action by an employee for breach of a contract of employment, the burden is upon the defendant to establish a defense of justifiable discharge and not upon the plaintiff to prove that he was wrongfully discharged. "The law will not assume that a servant has been derelict in duty from the fact that his employer discharged him, but upon proof under proper allegations that he was discharged while engaging in the performance of the contract and before his term of service had expired, the burden is cast upon the

employer of proving, and hence of alleging, facts in justification of the dismissal." *Linton v. Unexcelled Fireworks Co.*, 124 N. Y. 533, 27 N. E. 406; *Herreshoff v. American & British Mfg. Co.*, 164 App. Div. 238, 149 N. Y. S. 703, *Richardson's Cases in Evidence*, p. 303.

### § 190. Probate.

In will contests the burden is upon the proponent to prove due execution by and the testamentary capacity of the testator. *Delafield v. Parish*, 25 N. Y. 9; *Matter of Eno*, 196 App. Div. 131, 165, 187 N. Y. S. 756, *Richardson's Cases in Evidence*, p. 809; *Wheeler v. Rockett*, 91 Conn. 388, 100 Atl. 13. But the burden of proving undue influence is always on the contestant. *Matter of Kindberg*, 207 N. Y. 220, 228, 100 N. E. 789, *Richardson's Cases in Evidence*, p. 314; *Matter of Allaway*, 187 App. Div. 87, 175 N. Y. S. 70; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697. As to the burden of proof of a lost or destroyed will, see Editorial, *New York Law Journal*, October 6, 1927.

### § 191. Change of Domicile.

The question of domicile arises most frequently in taxable transfer cases. For the purposes of succession, every person must have a domicile somewhere and can have but one domicile. To effect a change of domicile there must be not only an actual change of residence but an intention to abandon the former domicile and acquire a new one. *Dupuy v. Wurtz*, 53 N. Y. 556. Owing to the frequent difficulty of arriving at a person's intention from the available facts, the question of which party must sustain the burden of proof upon this issue often becomes of primary importance. The common law rule, which was consistently followed in this state prior to 1916, is that where a domicile of origin is established, the burden of proving a change of domicile is upon the party asserting the change. *Winans v. Attorney General*, House of Lords (1904) App. Cas. 287; *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950. The Tax Law, sec. 243, as amended by the Laws of 1916, Chap. 551, provides

that every person who has resided in this state during the greater part of one year within the last two years of his life, shall be deemed to have died a resident of New York and that "the burden of proof in a transfer tax proceeding shall be on those claiming exemption by reason of the alleged non-residence of the deceased." In *Matter of Frick*, 116 Misc. 488, 190 N. Y. S. 262, it is held, under this statute, that the burden of proof is cast upon the executors to establish non-residence, and in *Matter of Lyon*, 116 Misc. 640, 191 N. Y. S. 260, Surrogate Slater expresses the opinion that the long established rule that the burden of proof rests upon the party alleging a change of domicile has been changed by this section. It must be noted, however, that since the amendment of 1916, the Appellate Division has held, in accordance with the old common law rule, without referring to the statute in question, that the burden rests upon the party asserting another domicile to establish that the domicile of origin was abandoned or changed. *Matter of Harkness*, 183 App. Div. 396, 170 N. Y. S. 1024; *Matter of Lydig*, 191 App. Div. 117, 180 N. Y. S. 843. Unquestionably the old presumption of continuance of the domicile of origin until a new domicile is shown to have been acquired is still in force, except in cases where the facts of residence raise a different presumption under the Tax Law, sec. 243. *Matter of James*, 221 N. Y. 242, 256, 116 N. E. 1010. It may well be that the learned justices of the Appellate Division, writing in *Matter of Harkness* and *Matter of Lydig*, *supra*, in stating that the burden of proof was on the party asserting a change of domicile, used the term "burden of proof" in the sense of the duty of going forward with evidence to overcome the presumption of continuance of domicile of origin.

## CHAPTER VIII.

### PROVINCE OF JUDGE AND JURY

#### § 192. Questions of Law for Court.

Questions of law involve the application of principles of statutory or common law and, except in criminal prosecutions for libel, are to be determined exclusively by the court. Given certain facts, what are the legal effects? This question is to be answered by the court and it would be error to submit it to a jury. *Outhouse v. Baird*, 121 App. Div. 556, 106 N. Y. S. 246.

#### § 193. Single Exception—Criminal Libel.

By statute in this state, in a criminal prosecution for libel, the jury is given the right to determine both the law and the fact. Code of Crim. Pro., sec. 418.

#### § 194. Questions of Fact for Jury.

Questions of fact arise whenever the existence or non-existence of a thing, condition or circumstance is in question. These questions are to be determined by the jury from the evidence introduced. In giving instructions to the jury, the court must confine itself to questions of law. It would be error for the court to inform the jury as to what facts have been proved and what have not. *People v. Walker*, 198 N. Y. 329, 91 N. E. 806, *Richardson's Cases in Evidence*, p. 318.

#### § 195. Exceptions. Facts for Judge.

But certain preliminary questions of fact, as well as questions of law, are determined by the court. Among these facts are:

1. Facts preliminary to determining the admissibility of evidence. Illustration: the fact that a writing has been lost as a foundation for the admission of secondary evi-



dence. *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Roberge v. Winne*, 144 N. Y. 709, 715, 39 N. E. 631.

2. Facts preliminary to determining the competency of witnesses, such as the relations existing between persons (as husband and wife, attorney and client, physician and patient), the intelligence of children or the qualification of experts. *Scherpf v. Szadeczky*, 1 Abb. Pr. (N. Y.) 366; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Finn v. Cassidy*, 165 N. Y. 584, 594, 59 N. E. 311, 53 L. R. A. 877.

3. Foreign Law. The conflicting authorities in this state are reconciled in the opinion of the Court in *Hanna v. Lichtenhein*, 225 N. Y. 579, 122 N. E. 625. It is held in that case that foreign law is a question of fact and must be proved as such; that the construction and effect of foreign statutes or judicial opinions are questions for the court; that when the evidence furnished is conflicting or inconclusive, the law of a foreign state may be a question for the jury, although ordinarily when the evidence is all furnished it is the function of the judge to determine what is the law of a foreign state.

4. Facts judicially noticed. See Chapter 1.

### § 196. Mixed Questions of Law and Fact.

A mixed question of law and fact arises where the action involves both questions of law and of fact, blended in such form as to make it difficult, if not impossible, to leave the fact for the jury and the law for the court. The general rule in these cases is that when the evidence is conflicting, the jury is to decide, under instructions from the court as to the law; when the facts, though undisputed, are such that different men might reasonably draw opposing inferences therefrom, the inference is a question of fact to be drawn by the jury, under instructions from the court as to the law applicable to the case; but when the facts are undisputed and only one inference can reasonably be drawn therefrom, the question is purely one of law and the court should decide it. The most frequent questions of this nature are those arising in actions involving

*mixed*  
*where fact*  
*disputed*  
*Reasonable*  
*time*  
*2. Probable*  
*cause*

1. Reasonable time,
2. Reasonable care (negligence cases),
3. Reasonable or probable cause (actions for malicious prosecution).

### § 197. Reasonable Time.

Although it has been said that, where there is no dispute as to the facts, the question of reasonable time is one of law to be decided by the court (*Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548, 552, 90 Am. Dec. 736; *Levant Amer. Commercial Co., Inc. v. Wells & Co., Inc.*, 186 App. Div. 497, 174 N. Y. S. 303), the weight of authority in this state holds that what is reasonable time is generally a question of fact for the jury, to be decided in the light of the circumstances of the case, and that only in cases where but one inference can reasonably be drawn from the evidence does reasonable time become a question of law for the court to decide. *Greacen v. Poehlman*, 191 N. Y. 493, 498, 84 N. E. 390; *Gerstenblith v. Meyer*, 191 N. Y. S. 1.

### § 198. Negligence Cases.

In negligence cases many close questions arise as to the province of the court and jury. Any dispute as to the facts, must, of course, be settled by the jury. Ordinarily the jury must go further and decide as a question of fact whether a defendant charged with negligence acted as a reasonably prudent man would act under the circumstances and, similarly, whether the plaintiff took such precautions as a reasonably prudent person would have taken. *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *Kettle v. Turl*, 162 N. Y. 255, 56 N. E. 626; *Shields v. Consolidated Gas Co.*, 193 App. Div. 86, 183 N. Y. S. 240. But there are certain acts which have been judicially determined to constitute negligence as matter of law. In any case in which negligence is the only possible inference that could reasonably be drawn from the evidence, the court is justified in ruling that the acts in question constitute negligence as matter of law.

Instances of acts held to be negligent as matter of law: Carrying a gun on shoulder in a city street; leaving a spirited horse unhitched in a street; sending out a train without brakes, and sending box of dynamite by express without disclosing its contents, *Greenleaf on Ev.*, 16th Ed., sec. 81 f; failure of a lineman to inspect cross-arm before placing his weight upon it, *Johnston v. Syracuse Lighting Co.*, 193 N. Y. 592, 86 N. E. 539, 127 Am. St. Rep. 988; making flying switch of a train of cars, so that the engine with the first section of cars passed a highway in advance of the rear portion, *D., L. & W. R. R. Co. v. Converse*, 139 U. S. 469, 35 Law. Ed. 213, 11 Sup. Ct. Rep. 569; walking deliberately in front of a rapidly approaching car, *McGuire v. N. Y. Railways Co.*, 230 N. Y. 23, 128 N. E. 905; crossing a city street or walking in front of an approaching train without looking (stopping not necessary in New York; *contra* in many jurisdictions), *Knapp v. Barrett*, 216 N. Y. 226, 110 N. E. 428; *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, *Richardson's Cases in Evidence*, p. 187; *Castle v. Director-General of Railroads*, 232 N. Y. 430, 134 N. E. 334. In *D., L. & W. R. R. Co. v. Converse*, *supra*, the Court said, at p. 473:

"Without attempting to formulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of defendant's train of cars in the night-time, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway, at grade, without some warning, by a flagman or by bell or whistle or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway, that the court was justified in saying, as a matter of law, not simply that such facts were evidence of negligence, but that they constituted negligence, upon the part of the company. It was justified in so instructing the jury, because everyone knows, and therefore the court knew, that such use of defendant's tracks, where they crossed the country road, unnecessarily

endangered the safety of anyone who, at the time, crossed the railway tracks while traveling on that highway."

### § 199. Malicious Prosecution.

Where the action is for malicious prosecution, what constitutes reasonable and probable cause is a question of law for the court. What the circumstances were attending the prosecution is a question of fact for the jury. The jury, therefore, determines the facts and whether they are brought within the law as laid down by the court. *Heyne v. Blair*, 62 N. Y. 19. Where the facts were undisputed, the existence of probable cause is a question for the court. *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Day v. Levine*, 181 App. Div. 261, 168 N. Y. S. 334, *aff'd* 228 N. Y. 588, 127 N. E. 911. But where different inferences and conclusions may be drawn from the evidence, the question is one for the jury. *Halsey v. N. Y. Soc. for the Suppression of Vice*, 191 App. Div. 245, 180 N. Y. S. 836.

### § 200. Interpretation of Documents.

The construction of a written contract or other document, plain and unambiguous in its language, is a question of law for the court. *Wood v. Glens Falls Automobile Co.*, 174 App. Div. 830, 161 N. Y. S. 808. If necessary to ascertain the surrounding circumstances to complete the meaning of words, the question must be left to the jury. *McNamee v. Hunt*, 87 Fed. 298; *Goldblatt v. Longacre Const. Co.*, 170 N. Y. S. 54.

### § 201. Sufficiency of Evidence.

Whether, in a given case, there is sufficient evidence to warrant its submission to a jury is a question of law and not one of fact, as is frequently supposed. The court, therefore, in deciding the question, is acting fully within its province. Insufficient evidence is in the eye of the law, no evidence. *Pollock v. Pollock*, 71 N. Y. 137, 153; *Laidlaw v. Sage*, 158 N. Y. 73, 94, 52 N. E. 679. The courts have frequently quoted with approval the statement in *Jewell v.*



Parr, 13 C. B. 916, 138 Eng. Rep. 1460, that "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." *Matter of Case*, 214 N. Y. 199, 108 N. E. 408. But if any legitimate conclusion can reasonably be drawn from the evidence, the jury should be allowed to pass upon it. *Queeney v. Willi*, 225 N. Y. 374, 122 N. E. 198. There is no question but that the trial judge has the power and duty to set aside a verdict contrary to the weight of evidence. *O'Keeffe v. O'Keeffe*, 208 App. Div. 750, 202 N. Y. S. 769.

## § 202. Directed Verdict.

Early cases in the Court of Appeals and Appellate Division are in confusion as to the power of a trial judge to take a case from the jury and direct a verdict in a civil action where there is a conflict in the evidence and an issue of fact is presented but where, in the opinion of the Court, the evidence offered by one party so far outweighs that of the other party that a verdict for the latter would have to be set aside as against the weight of evidence. But in *McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 282, *Richardson's Cases in Evidence*, p. 324, the Court of Appeals laid down the rule definitely that in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that issue must be decided by the jury, and the Court may not direct a verdict, even though it may afterwards set aside the jury's verdict as against the weight of evidence. Judge Martin, in his very able opinion, points out that the result of setting aside a verdict and the result of directing one are widely different. When a verdict is set aside, a new trial is granted and another jury is permitted to pass upon the issues, but if a verdict is directed, the court usurps the function of the jury in deciding questions of fact and thus concludes the parties, who are thereby deprived of their constitutional right of trial by



jury. See, also, *Getty v. Roger Williams Silver Co.*, 221 N. Y. 34, 116 N. E. 381.

The Civil Practice Act, sec. 457a, added by Laws of 1921, Chap. 372, provides that "The judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence." The constitutionality of this statute has not yet been tested in our courts, but it would seem that, since the right of trial by jury in a common law action is a constitutional right, of which the parties would be deprived by the action of a trial court under the authority of this section, the statute would be held unconstitutional as applied to any case which falls within the rule laid down in *McDonald v. Metropolitan Street Ry. Co.*, *supra*.

### § 203. Directed Verdict Not Allowed in Criminal Cases.

Under no circumstances may a trial judge direct a verdict in a criminal case. In *People v. Walker*, 198 N. Y. 329, 91 N. E. 806, *Richardson's Cases in Evidence*, p. 318, the Court said, at p. 334:

"While in a civil action, when there is no conflict in the evidence and no diverse inferences therefrom are possible within reason, the court may direct a verdict even in a case of the utmost importance, still in a criminal action this is not permitted by the law even in a case of the most trifling importance."

### § 204. New York Limitation on Power of Court to Comment on Facts.

Comments by a judge during a trial or in his charge to the jury which assume the falsity of the testimony of a witness are not allowed. A judge should not by his attitude or comments force his opinion as to the guilt or innocence of the defendant upon a jury. To do so would be error as matter of law. *People v. Ohanian*, 245 N. Y. 227, 157 N. E. 94.

In the *People v. Ohanian* case, *supra*, the Court, upon a defense to a charge of larceny that the defendant did not

remember where he put the jewelry which the prosecution claimed he had stolen, said during the testimony of the defendant:

"I do not think the jury is going to be sympathetic." "You cannot slip anything like that here." "I can readily see the motive of that." The following remarks were addressed to the defendant's counsel satirically. "I am going to ask the jury to believe his story. . . . You said yourself you do not know whether he was telling the truth to you. If you are in doubt about it, what are you going to say to the jury?" In the charge of the court appeared the following: "Subterfuge will not go in this court. Absurd excuses should not govern a jury. I must say that the defense interposed is extraordinary. Can a man come into this court and hood-wink a jury, bamboozle twelve men and say that he does not remember what happened because he had a headache and other ailments that have been described here?"

Despite subsequent instructions to the jury to, "Disregard pretty much everything I said if you see fit," as well as the usual instructions as to presumption of innocence and the defendant's right to be given the benefit of a reasonable doubt, the Court of Appeals unanimously reversed the judgment of the trial court saying, "We cannot escape the conclusion that the judge made himself the trier of facts and acted as a self-appointed substitute for a jury." Such conduct is a violation of the Code of Criminal Procedure, sec. 419, and as such constitutes an error of law. There was only one question in this case and that was whether defendant's testimony concerning his forgetfulness was true or false. In language undisguised the judge decided the question. An error which prevents proper consideration by the jury of the only question relied on by the defendant is substantial not technical and we have no right to disregard it. *People v. Gerdvane*, 210 N. Y. 184, 187, 104 N. E. 129.

The following statement or credo was presented by Mr. Justice Proskauer of the Appellate Division in his address at a meeting of the Association of the Bar of the City of

New York at its meeting February 2, 1928. At a subsequent meeting of the Association these principles were officially approved.

"I will join with my adversary in waiving a jury trial wherever and whenever it can possibly be done without the sacrifice of a fundamental right.

"I will join with my adversary in supporting a trial justice in fair comment upon the evidence and reasonable direction to a jury on the facts.

"I will join with my adversary in fair concession of undisputed facts.

"I will not put an adversary to his proof in respect to facts whose existence my client admits.

"I will refrain from merely formal or technical objection to the admission of evidence.

"I will cooperate with the trial justice and my adversary to secure a speedy, prompt and complete presentation of the facts of the case.

"I will neither make nor oppose interlocutory motions unless they are of real and practical importance.

"I will take no appeal unless I am satisfied that a substantial error has been committed and that a new trial should reasonably give a different result."

## CHAPTER IX.

### THE BEST EVIDENCE RULE

#### § 205. Rule as to Best Evidence.

The best evidence rule, as it is understood and applied in present day practice, requires that the contents of a writing must be proved by producing the writing itself, unless sufficient reason is shown for not doing so. *Mahaney v. Carr*, 175 N. Y. 454, 461, 67 N. E. 903; *Butler v. Mail & Express Pub. Co.*, 171 N. Y. 208, 211, 63 N. E. 951, *Richardson's Cases in Evidence*, p. 327; *Michigan Law Review*, March, 1927.

#### § 206. Applies Only to Writings.

Formerly, the rule had a much broader application. As originally understood, the rule required the best evidence which the nature of the case would admit, and, as thus applied, embraced all classes of evidence. For a discussion of the history and theory of the rule, see *Greenleaf on Ev.*, 16th Ed., sec. 81 h. Except in the case of writings, the law now recognizes no distinction in degrees of evidence, so far as admissibility is concerned, no matter how great a distinction there may be in weight or probative force, which will of course vary according to the quality of the evidence. *People v. Fernandez*, 35 N. Y. 49, 61; *Seidenspinner v. Met. Life Ins. Co.*, 175 N. Y. 95, 98, 67 N. E. 123.

#### § 207. Reason for the Rule.

A few authorities hold that the rule was adopted to prevent fraud, which would naturally be attempted if the parties were at liberty to prove the contents of a writing by parol. But the better reason for the rule seems to be the prevention of mistake or error; as, for instance, if copies are used there is the possibility of error in copying, or if the memory is relied upon, mistake of a word or words might result in great injustice. These contingencies, though

not the result of a fraudulent design, wholly disappear when the original is produced. Wigmore on Ev., secs. 1179 and 1180.

### § 208. Inscribed Chattels.

There is no settled doctrine applying the best evidence rule to material objects, not paper, bearing inscriptions in words. It seems illogical to base a distinction upon the material bearing the inscription. Whenever practical to do so, one should argue in favor of an application of the rule to banners, flags, notice-boards, etc., bearing inscriptions and mottoes, as well as to a sheet of paper. On the other hand, the courts frequently excuse the production of inscribed chattels on the ground of inconvenience. In refusing to apply the rule to inscriptions on boxes belonging to a passenger killed on a railroad, the Colorado Court of Appeals said:

"If a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts a court room into a receptacle for wagons, boxes, tombstones and the like on which one's name may be written." *Kansas, Pac. Ry. Co. v. Miller*, 2 Colo. 442. The precedents requiring and not requiring production of inscribed chattels are irreconcilable in many instances, but it may be said with a fair degree of certainty that when the only purpose of the writing is to identify the article, it is generally held that it is not necessary to produce the original. In *Commonwealth v. Blood*, 11 Gray (Mass.) 74, the labels of "rye whiskey" on jugs were proved without requiring the jugs to be produced. Oral evidence of the writing on a valise tag was admitted, in *Commonwealth v. Morrell*, 99 Mass. 542, without requiring the tag itself to be produced or proving its loss. The recent case of *Carroll v. Gimbel Bros.*, 195 App. Div. 444, 186 N. Y. S. 737, is in point. The action was for false imprisonment in detaining the plaintiff on a charge of shoplifting. The trial judge excluded testimony offered by the defendant that the several drug articles found in the plain-



tiff's bag, which she claimed to have bought at Macy's, all bore the stamp and tag of the defendant, Gimbel Bros., on the ground that the articles themselves were the best evidence. This was held reversible error. But when the chattel is merely a background for the writing, as in the case of a sign or notice-board, the best evidence rule applies. The Appellate Division held in a recent case that it was reversible error to admit oral evidence of an alleged printed rule, said to be posted in a car, when the posted rule was not produced or its absence accounted for. *Longacre v. Yonkers R. R. Co.*, 191 App. Div. 770, 182 N. Y. S. 373. Maps, surveys, and drawings of the plan of a house were not distinguished, in *Bryant v. Stilwell*, 24 Pa. 314, 317, from other papers requiring production. In many cases the rule is held technically to apply, but very slight evidence is held sufficient to lay a foundation for the admission of secondary evidence, due to the fact that the writing was a mere label or tag or wrapper on a package and would not ordinarily be preserved; *e. g.*, a wrapper of a butter package, *Wright v. State*, 88 Md. 436, 41 Atl. 795; a card attached to a pile of railroad ties and bearing the words "Arkansas and Texas Tie Company. Creosote Treated Ties," *Atchison, T. & S. F. R. R. Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90.

### § 209. Rule Embraces All Kinds of Writings.

The best evidence rule applies to all kinds of writings which are material to the issues, from an official record or a deed to a private letter or a mere memorandum on a slip of paper. Whenever it becomes necessary to prove the contents of a document, it must be produced or its absence accounted for. *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211. Illustrations: In an action for trespass in cutting down plaintiff's trees, the plaintiff was asked, "Do you own the farm?" The question was properly objected to because title to land cannot be proved by oral testimony, since the deed is the best evidence. *Carter v. Pitcher*, 87 Hun 580, 34 N. Y. S. 549. The rule has been applied to contracts, Mat-

ter of Hamilton, 182 App. Div. 908, 171 N. Y. S. 33; written assignments, *Schack v. Wormser*, 185 N. Y. S. 580; checks and stubs, *Matter of Carrington*, 163 App. Div. 544, 148 N. Y. S. 952; a card taken from a prisoner's pocket, bearing an address and telephone number, *Young v. People*, 221 Ill. 51, 77 N. E. 536, *Richardson's Cases in Evidence*, p. 329; in short, to any and every kind of writing used for evidential purposes.

### § 210. Writing Not in Issue.

Where the writing is not in issue, but merely collateral to it, the best evidence rule has no application, and parol evidence of the contents of the writing is admissible. *Reynolds v. Kelly*, 1 Daly (N. Y.) 283; *Fairchild v. Fairchild*, 64 N. Y. 471; *Clover Crest Stock Farm, Inc. v. N. Y. C. M. F. Ins. Co.*, 189 App. Div. 548, 179 N. Y. S. 352. Thus, if an action is brought under a statute to recover money paid to the defendant for a lottery ticket, it is not necessary to produce the ticket on the trial, for the action is not based upon any contract evidenced by the ticket. *Grover v. Morris*, 73 N. Y. 473. Again, in an action to recover money deposited by plaintiff with defendant, the plaintiff was permitted to testify to the amount of a draft which he had deposited, as the amount of the deposit and not the draft was the subject of the controversy. *Bowen v. National Bank of Newport*, 11 Hun 226. And in an action against the holder of a liquor tax certificate to recover the penalty of his bond on the ground that the premises had been used for illegal purposes, it was held unnecessary to produce the original certificate and that the fact that the certificate had been issued to the defendant might be proved by the testimony of the county treasurer who issued it and also by a witness who had seen it posted in the defendant's window. *Cullinan v. Horan*, 116 App. Div. 711, 102 N. Y. S. 132, *Richardson's Cases in Evidence*, p. 339.

Again, if a fact has been reduced to writing, the fact may be proved independent of the writing. Thus, payment of money or receipt of goods is a fact which may be proved by

parol, although a receipt was given. *Keene v. Meade*, 3 Pet. (U. S.) 1, 7 Law. Ed. 581; *Steele v. Lord*, 70 N. Y. 280, 26 Am. Rep. 602; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514. The fact that a notice was given or received may be proved by parol, without producing the notice, but where notice, before bringing the suit, is the basis of the action, secondary evidence of its contents cannot be given until its absence is satisfactorily explained. *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667. Similarly, the facts of marriage, birth, age, citizenship, etc., may be proved by oral testimony. In *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016, *Richardson's Cases in Evidence*, p. 359, objection was taken to the oral proof of marriage on the ground that the record should be produced, and the Court said: "It is true that the record by statute is presumptive evidence of the marriage, but the record of a marriage is not like the record of a divorce, or other judgment or decree. It is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact." Since a divorce is effectuated by a judicial decree, the best evidence rule requires that the fact of divorce be proved by the decree itself. *Tice v. Reeves*, 30 N. J. L. 314. But where a divorce has been obtained in a foreign country where different laws and customs prevail, as in the case of a rabbinical divorce, oral testimony of the fact will be received in our courts upon the same principle that marriage, birth, death, etc., may be proved by witnesses as well as by records. *Matter of Spondre*, 98 Misc. 524, 162 N. Y. S. 943.

The same theory is applied with respect to the testimony of a witness upon a former trial. Oral evidence of one who was present at the trial and heard the testimony is admissible. The stenographer's minutes are not the best evidence in the sense that all other evidence is secondary. *Weinhandler v. Eastern Brewing Co.*, 46 Misc. 584, 92 N. Y. S. 792. But where the examination of a witness is reduced to writing and is subscribed by him for the purpose of making an accurate record of his testimony, the writing be-

comes the best evidence of the testimony or statements thus made. *Kain v. Larkin*, 131 N. Y. 300, 311, 30 N. E. 105, *Richardson's Cases in Evidence*, p. 341.

### § 211. What Is the "Original" Writing?

It is commonly said that the original paper, and not a copy, must be produced. When one writing or paper is said to reproduce the terms of another, the former is the "copy," the latter the "original." But the "copy," under certain conditions, may become the "original." Wigmore on Ev., secs. 1231, 1235. Contracts and other writings are frequently executed in duplicate, each party retaining one. All such duplicates and counterparts are regarded as originals. It follows, therefore, that either party may produce the duplicate which he has and prove it as an original copy without proving or producing the other. *Hubbard v. Russell*, 24 Barb. (N. Y.) 404; *Crossman v. Crossman*, 95 N. Y. 145; *Sarasohn v. Kamaiky*, 193 N. Y. 203, 86 N. E. 20. But all duplicates must be accounted for before using copies. Where several copies of a writing are made at the same time by the same mechanical operation, each is regarded as an original. Thus, printing press copies or all the reproductions from the same setting of type are treated as originals. *Huff v. Bennett*, 6 N. Y. 337. The most important application of this rule at the present time is found in the case of carbon copies. If the entire document is written at the time the carbon copy is made, leaving no blanks to be filled in later, the carbon copy will be received in evidence as a duplicate original. But where several copies are made on the typewriter at the same time, by the use of carbon paper, and then one of them is signed, the signed copy becomes the original and the others are copies with the signature missing. 22 C. J., p. 1024; *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252, *Richardson's Cases in Evidence*, p. 360; *Liberty Chair Co. v. Crawford*, 193 N. C. 531, 137 S. E. 577; *Michigan Law Review*, March, 1925. A letter press copy is not admissible as an original writing because it is not made at the same time as the original.



Foot v. Bentley, 44 N. Y. 166, 170, 4 Am. Rep. 652. A photograph of a writing, being only a reproduction of the original, is secondary evidence. Hynes v. McDermott, 82 N. Y. 41, 50, 37 Am. Rep. 538.

### § 212. The Rule as Applied to Telegrams.

The best evidence rule applies to telegrams, as well as to other writings. There has been, however, some difficulty in determining what are original telegrams within the meaning of the rule. Whether the telegram left with the operator or the one received by the addressee is to be deemed the original depends upon for whom the telegraph company is acting. By weight of authority the party taking the initiative makes the company his agent for the delivery of the telegram and is bound by the message as delivered. The original, therefore, is ordinarily the telegram as actually delivered to the addressee, and is primary evidence of the contents of the message sent. But when the person to whom a telegram is sent assumes the risk of its transmission or is the employer of the telegraph company, the message delivered to the operator is the original, and must be produced as being the best evidence. Therefore, in proving a contract by telegram, the best evidence is the telegram containing the offer as received by the offeree and the despatch containing the acceptance as delivered by the acceptor to the company for transmission. *Anheuser-Busch Brewing Co. v. Hutmacher*, 127 Ill. 652, 21 N. E. 626; *Montgomery v. United States*, 219 Fed. 162. There must, of course, be competent proof that the alleged sender did actually send or authorize the sending of the message in question. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485. In controversies between the sender and the telegraph company, the primary or best evidence of the despatch is the message left with the company for transmission. *Weld v. Postal Telegraph-Cable Co.*, 199 N. Y. 88, 92 N. E. 415.

### § 213. Public Documents.

Judicial records and entries in public books or registers



may be proved by certified copies. Copies of the record are admitted because of the inconvenience which the removal of the records or documents might occasion to the public. There would be, also, if a removal of the books and papers were permitted, the added risk of their loss or destruction. The Civil Practice Act fully provides how copies of public and private documents may be obtained and used. Where a copy may be used, the law does not recognize any excuse for a failure to produce a copy, for if one is lost, another may be procured. Civil Practice Act, secs. 380 to 402.

#### **§ 214. Voluminous Entries and Records.**

The results of voluminous entries or records may, in the discretion of the court, be proved by an expert accountant or other competent person, if the books, records, etc., are properly in evidence or were placed at the disposal of the opposite party. *Von Sachs v. Kretz*, 72 N. Y. 548, 552; *North. Pac. R. R. Co. v. Keyes*, 91 Fed. 47.

#### **§ 215. Admissions Concerning Writings.**

The question whether oral admissions of a party can be used as evidence against himself, although they relate to a formal writing in issue in the case, is variously determined. In England the question is answered affirmatively. *Slat-terie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579. In the United States the decisions are in irreconcilable conflict. *Swing v. Cloquet Lumber Co.*, 121 Minn. 221, 141 N. W. 117; *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771, *Richardson's Cases in Evidence*, p. 333. The Supreme Court of the United States follows the English rule. *Dunbar v. United States*, 156 U. S. 185, 39 Law. Ed. 390, 15 Sup. Ct. Rep. 325. In New York such admissions are competent only where parol evidence would be admissible to establish the same fact. In a prosecution for obtaining money under false pretenses, it became necessary to prove the existence of a mortgage on the prisoner's house, which he had represented to the lender to be free from all encumbrances. To do this, a witness was permitted to testify that, in a certain

conversation, the prisoner told him he owned a house and lot worth \$40,000, which was encumbered by a mortgage of \$20,000. The Court, in holding this to be error, said, "The existence of the encumbrance was a material fact for the prosecution to prove, and the best evidence was the mortgage itself, the record, or a certified copy of the record. Without accounting for the absence of these, secondary evidence was not admissible. Verbal admissions of the defendant were no higher evidence than parol testimony of the contents of the mortgage. It seems to be the rule in this State that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent." *Sherman v. People*, 13 Hun 575, *Richardson's Cases in Evidence*, p. 352. But copies admitted to be correct by the other party have been held admissible as an exception to the rule of the incompetency of admissions concerning writings. *Cociancich v. Zazzoler*, 48 App. Div. 462, 62 N. Y. S. 893; *Haas v. Storer*, 21 Misc. 661, 47 N. Y. S. 1100. Where it has been shown that the original writing has been lost or destroyed, so that a proper foundation has been laid for the introduction of secondary evidence, admissions of the adverse party will be received in evidence to prove the former existence and contents of the lost writing. *Mandeville v. Reynolds*, 68 N. Y. 528, 536.

### § 216. What Constitutes Production.

Production implies handing the writing to the tribunal or reading it aloud by witness or counsel. The production is for the benefit of the court and not for the benefit of the opponent or witness. *Wigmore on Ev.*, sec. 1185.

### § 217. Production Compelled.

The production of a document may be compelled by an order of the court requiring the opponent to produce it, or by a subpoena *duces tecum*. *Civil Practice Act*, sec. 411. A failure to obey the order of the court is punishable for

contempt. *Dunn v. New York Edison Co.*, 46 Misc. 602, 92 N. Y. S. 787.

The production of books and papers under the control of a corporation may be compelled. Civil Practice Act, sec. 413.

### **§ 218. Divisions—Primary and Secondary Evidence.**

When an original document is placed in evidence, it is said to be primary evidence of its contents. But a copy of the document, as well as the recollections of a witness as to its contents, is known as secondary evidence. The rule is fundamental that secondary evidence of an instrument cannot be given unless a sufficient legal excuse is shown for a failure to produce the original. *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274.

## **SECONDARY EVIDENCE**

### **§ 219. Grounds for Admission.**

If it is shown by satisfactory proof that the original writing has been lost or destroyed, or that it is unobtainable because out of the jurisdiction of the court or in possession of the adverse party, who, upon due notice, refuses to produce it, secondary evidence of its contents becomes admissible. *Enders v. Sternbergh*, 33 How. Pr. (N. Y.) 464; *Ford v. Walsworth*, 19 Wend. (N. Y.) 334.

### **§ 220. Degree of Diligence Required in Search for Lost Paper.**

The general rule as to the diligence required in the search for lost documents is stated in *Kearney v. Mayor*, 92 N. Y. 617, *Richardson's Cases in Evidence*, p. 331, as follows: "The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has, in good faith, exhausted to a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which

were accessible to him." But there is not and cannot be any definite rule as to what will, in all cases, constitute a diligent search for a writing alleged to be lost. The sufficiency of the search must depend on the circumstances of each case, the character and importance of the paper, the purposes for which it is proposed to use it, and the place where it is likely to be found. *Cole v. Canno*, 168 App. Div. 178, 153 N. Y. S. 957.

Illustrations—Diligence: No foundation is laid for the introduction of secondary evidence by the testimony of a witness that he had not the papers with him, *Large v. Vandorn*, 14 N. J. Eq. 208; that the attorney and client each supposed the other would bring the letters and neither made a special search, *Simpson v. Dall*, 3 Wall. (U. S.) 460, 18 Law. Ed. 265; that a party has sent a paper to a public officer for record, *Fitch v. Randall*, 163 Mass. 381, 40 N. E. 182; *Jackson v. Todd*, 3 Johns. (N. Y.) 300; that the paper was lost or destroyed, *Anglo-American Packing Co. v. Cannon*, 31 Fed. 313; *Dishaw v. Wadleigh*, 15 App. Div. 205, 211, 44 N. Y. S. 207. See, also, where search was held insufficient to justify secondary evidence, *Brown v. Harkins*, 131 Fed. 63. Cases holding sufficient search: *Jackson v. Neely*, 10 Johns. (N. Y.) 374; *Jackson v. Woolsey*, 11 Johns. (N. Y.) 446, 454; *Leland v. Cameron*, 31 N. Y. 115, 120.

### § 221. Last Custodian.

The testimony of the last custodian of the paper should be produced, and, if he be dead, his personal representative should be called. The testimony must, of course, be given under oath, with right of cross-examination. If the person last known to have possession of the paper is out of the State, his deposition must be procured, if practicable, or some good excuse given for failure to produce it. *Kearney v. Mayor*, 92 N. Y. 617, *Richardson's Cases in Evidence*, p. 331.

### § 222. Importance of Document as Affecting Diligence.

The degree of diligence required in searching for the

writing alleged to be lost varies in proportion to the importance and value of the writing. If the writing is important, strict proof of search may be required, but if it is of little value, or of only transitory interest, as, for instance, an envelope, a wrapper, a newspaper, or a private letter, very slight evidence of search may suffice to lay a foundation for the admission of secondary evidence of its contents. *Baker v. Squier*, 1 Hun 448, 3 Thompson & Cook (N. Y. Sup.) 465; *Jackson v. Roote*, 18 Johns. (N. Y.) 60; *People v. Dolan*, 186 N. Y. 4, 13, 78 N. E. 569.

### § 223. Sufficiency of Proof of Loss.

The sufficiency of the proof of loss is a question of fact for the trial judge, and will not be reviewed on appeal by the higher courts. *Mason v. Libbey*, 90 N. Y. 683.

### § 224. Destruction by Party Offering Secondary Evidence.

Proof of the destruction of the original writing by the party offering secondary evidence is not sufficient to lay a foundation for secondary evidence, unless reasonable cause for its destruction be shown. The cause or motive prompting the act is the controlling factor in determining the admissibility of such evidence. The transaction must be free from suspicious circumstances. Thus, if destruction of the writing was with fraudulent design, or to create an excuse for its non-production, parol evidence would be inadmissible. *Joannes v. Bennett*, 5 Allen (Mass.) 169, 81 Am. Dec. 738; *West v. N. Y. C. & H. R. R. Co.*, 55 App. Div. 464, 67 N. Y. S. 104; *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126. But when the writing was destroyed in the usual course of business, or had no value, or when there was no reason for its preservation, the destruction is not fraudulent, and secondary evidence is admissible. *Steele v. Lord*, 70 N. Y. 280, 26 Am. Rep. 602, *Richardson's Cases in Evidence*, p. 348; *Dearing v. Pearson*, 8 Misc. 269, 28 N. Y. S. 715.



**§ 225. Destruction by Adverse Party.**

Where the writing has been destroyed by the adverse party, whether with or without design, secondary evidence is admissible. *Scott v. Pentz*, 5 Sandf. (N. Y. Super.) 572.

**§ 226. Documents Beyond Jurisdiction of Court.**

In some jurisdictions when a document is shown to be beyond the jurisdiction of the court, secondary evidence of its contents may be given without further proof of the impossibility of procuring the original. See cases collected in L. R. A. 1917D 530, note. It is held, however, in New York State and many other jurisdictions, that the mere fact that documents are without the jurisdiction of the court and beyond its process does not warrant the admission of secondary evidence. In such cases, some effort should be made to obtain the original writing or best evidence, and if unsuccessful, to procure, if practicable, the deposition of the person having possession of the documents, or give some good excuse for not doing so. As a production of the original, under such circumstances, cannot be compelled, a copy should be attached to the deposition and used as secondary evidence. *Kearney v. Mayor*, 92 N. Y. 617, *Richardson's Cases in Evidence*, p. 331. The weight of authority sustains the New York rule. *Fisher & Ball v. Carter*, 178 Iowa 636, 160 N. W. 15.

**§ 227. Detention of Documents by Opponent.**

To properly lay the foundation for secondary evidence of a document alleged to be controlled by the opponent, it must be shown

- (a) That it is in his possession or under his control;
- (b) That due demand or notice to produce it has been given him; and
- (c) That he has failed or refused to produce it in court.

**§ 228. Possession.**

If the proponent is unable to produce the paper because it is under the control of the opponent, the latter is said to

have possession. The instrument need not be in his actual custody; it is sufficient if it is in his power or under his control. If papers are not shown to be in the opponent's possession, failure to produce upon notice will not authorize secondary evidence. *Herman v. Heller*, 172 N. Y. S. 474.

It frequently happens that the only evidence of possession is proof of the mailing of letters or other documents, but this is sufficient evidence of their receipt by the addressee, and after notice to the addressee to produce, excuses the proponent's non-production. The question is fully discussed in *Gardam & Son v. Batterson*, 198 N. Y. 175, 91 N. E. 371, where it was held that, under the circumstances, there was not sufficient proof of the mailing of a letter to raise a presumption that it was sent, or that it was received by the addressee.

#### § 229. Notice to Produce.

Where the paper is in possession of the opponent, all that is required in order to lay the foundation for secondary evidence is reasonable notice to him to produce it. This is required "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence." *Dwyer v. Collins*, 7 Exch. 639, 155 Eng. Rep. 1104. A notice to produce does not compel the production of the paper, like an order of the court or a subpoena *duces tecum*, but merely lays the foundation for secondary evidence if the notice be disregarded. If the document is not in the court-room, secondary evidence may not be given unless it is shown that a reasonable notice to produce has been given. *Gordon v. Christenson*, 188 N. Y. S. 135; *Krupit v. Nat. Lib. Ins. Co.*, 192 N. Y. S. 341.

In a criminal case, the defendant is not obliged to respond to a notice to produce. He cannot be made to give any evidence that would tend to incriminate him. The admissibility of a copy of an original writing which is in the possession of the defendant is discretionary with the court. *State v. Snover*, 101 N. J. L. 543, 129 Atl. 198.

**§ 230. Time of Notice.**

The time of notice depends upon the circumstances of each case. It must be given in reasonable time to enable the opponent to be prepared to produce the papers at the time of the trial. *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296.

**§ 231. Notice at Trial.**

Where the document is at hand in the court-room an instant demand is sufficient notice. In such cases notice before trial is unnecessary. *Dwyer v. Collins*, 7 Exch. 639, 155 Eng. Rep. 1104; *Boynton v. Boynton*, 25 How. Pr. (N. Y.) 490, 16 Abb. Pr. (N. Y.) 87, aff'd 41 N. Y. 619; *Dole v. Belden*, 49 Hun 607, 1 N. Y. S. 667.

**§ 232. Notice Should Describe Desired Papers.**

A notice to produce papers should so describe them as to enable the party served with the notice to know what writings are required. *Arnstine v. Treat*, 71 Mich. 561, 39 N. W. 749.

**§ 233. Notice to Produce Unnecessary When Pleadings Give Notice.**

Where the pleadings or a bill of particulars, which is an amplification of the pleadings, give notice to the opposite party that he will be charged with the possession of the paper in question, no further notice to produce need be given in order to permit the introduction of secondary evidence. *Edwards v. Bonneau*, 1 Sandf. (N. Y. Super.) 610; *Lawson v. Bachman*, 81 N. Y. 616, 618, aff'd 109 U. S. 659, 27 Law. Ed. 1067, 3 Sup. Ct. Rep. 479; *Mirkus v. G. & S. Skirt Co.*, 185 N. Y. S. 867. Thus, in an action of trover for a note, it is not necessary to give notice to the defendant, for the pleadings give notice. *Bissell v. Drake*, 19 Johns. (N. Y.) 66.

**§ 234. Failure to Produce.**

Where due notice to produce a document has been given, and it is not produced, secondary evidence of its contents is

admissible. After secondary evidence of its contents has been received, the opponent should not be allowed to introduce the document to disprove the secondary evidence; nor should he be allowed to offer secondary evidence of its contents. *Mather v. Eureka Mower Co.*, 118 N. Y. 629, 633, 23 N. E. 993; *Platt v. Platt*, 58 N. Y. 646; *Cahen v. Continental Life Ins. Co.*, 69 N. Y. 300.

**§ 235. Neither Production nor Examination Puts Documents in Evidence.**

Neither the production of documents on notice to produce, nor an examination of them by the party calling for their production, puts them in evidence. If one concludes, after their inspection, that they contain nothing to his advantage, he need not use them, and this failure to put them in evidence does not give his opponent the right to use them unless they are competent evidence against the party calling for them. *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138, *Richardson's Cases in Evidence*, p. 353; *Karp v. Adelman*, 156 N. Y. S. 395. *Contra* in many jurisdictions. The authorities on this point are fully collated and discussed in *Smith v. Rentz*, *supra*.

**§ 236. Order of Proof.**

After proof of notice to the opponent to produce a document is before the court it becomes necessary to further prove the genuineness of the instrument. The logical order of proof for laying a proper foundation for the introduction of secondary evidence of a document seems to be as follows: (a) existence, (b) execution, (c) excuse for non-production and (d) contents. This order may, in the discretion of the court, be changed. *Wigmore on Ev.*, sec. 1189.

**§ 237. Proof of the Contents of Lost Document.**

The contents of a lost document must be proved clearly and in a satisfactory manner. While it is not to be expected that a witness can recite the contents of a writing, word for word, yet he must be able to state substantially and with

reasonable accuracy its contents. Thus, the testimony of one who has heard a deed read some years before, and who can now give only a small part of its contents, is incompetent. So, too, where a witness did not read the letter and had no personal knowledge of its contents but had merely heard another read it, it was held that he was not a competent witness to testify to the contents. *Edwards v. Noyes*, 65 N. Y. 125; *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618.

### § 238. Degrees of Secondary Evidence.

In New York the courts recognize no distinction in degrees of secondary evidence. In *Rosenbaum v. Podolsky*, 97 Misc. 614, 162 N. Y. S. 227, *Richardson's Cases in Evidence*, p. 357, counsel argued that oral evidence of an agreement should be rejected on the ground that a copy, which was admitted to exist, was the "best secondary evidence." The Court said, at p. 617: "Although the argument is plausible, it is apparent on a moment's reflection that proof of an instrument by proving a copy is merely one form of parol testimony as to its contents; and I am not aware of any rule of law that makes a distinction of grade in secondary evidence. Its probative force will of course vary according to the quality of the proof, but if parol testimony is permissible, it is competent; its character may be such as the party elects or finds possible, assuming of course always that it meets the other requirements relating to evidence generally." Editorial, *New York Law Journal*, January 14, 1926.



## CHAPTER X.

### HEARSAY EVIDENCE

#### § 239. Rule Defined.

One of the most important of the exclusionary rules of evidence is the Hearsay Rule. Our most learned and eminent writers of treatises on evidence have attempted to formulate technical definitions of the Hearsay Rule, nearly all of which are subject to criticisms as being too broad or too limited. Greenleaf on Ev., 16th Ed., sec. 99; Wigmore on Ev., sec. 1362. In simple language, hearsay evidence is evidence of the existence of a fact based not on the witness's own personal knowledge or observation but on what someone else said. Unless evidence falls within one of the well recognized exceptions, which will be fully discussed in the following chapters, it is always excluded.

The recent case of *People v. Erickson*, 226 Pac. (Cal.) 637 is instructive. The prosecution was for criminal syndicalism. It became desirable to prove the doctrines of the I. W. W., and to that end a witness testified that a delegate of that organization had told him that while the advocacy of sabotage had been eliminated from the literature of the order, it was still maintained and taught from "mouth to ear." In conclusion the delegate said "he wasn't afraid to tell me this because it would be hearsay testimony." While the testimony was admitted at the trial, the Court of Appeals held that the "wobbly" knew more law than the trial judge, and that it was hearsay and inadmissible. If, however, the fact in dispute is whether, in fact, a statement was made, as distinguished from the truth or falsity of the statement, of course any person who heard it may testify to the words he heard spoken. This is original evidence and not hearsay. Cases illustrating this distinction will be discussed under Apparent Exceptions to the Rule against Hearsay.

**§ 240. Reason for Rule.**

The reason for rejecting hearsay evidence is the desirability of testing all testimonial assertions by oath and cross-examination. *Greenleaf on Ev.*, 16th Ed., sec. 99a; *Donnelly v. United States*, 228 U. S. 243, 57 Law. Ed. 820, 33 Sup. Ct. Rep. 449, *Richardson's Cases in Evidence*, p. 706.

**§ 241. Oath.**

"If," says Justice Buller, "the first speech were without oath, that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice." *Bull. N. P.*, 294. *Greenleaf on Ev.*, 16th Ed., sec. 99a.

**§ 242. Cross-Examination. Its Object.**

The one test relied upon to expose weakness and to test the value to be given to statements is the cross-examination of witnesses. The object of the cross-examination of a witness is to test (a) his opportunities for observation, (b) his attentiveness in observing, (c) the strength of his recollections, and (d) his disposition to speak the truth. The statements or reports of a third party cannot be subjected to these tests. *Greenleaf on Ev.*, 16th Ed., sec. 98; *Wigmore on Ev.*, sec. 1367.

**§ 243. Illustrations.**

The application of the Hearsay Rule is illustrated by the following cases:

It was held reversible error to permit a witness to testify that just after a railroad accident he heard the bystanders talking about the absence of the flagman and heard one of them say that he was not attending to his business, as such testimony was mere hearsay. *Felska v. N. Y. C. & H. R. R. R. Co.*, 152 N. Y. 339, 46 N. E. 613.

It was error to permit a plaintiff to testify that she sent her ten-year old son to the store with a five-dollar bill to buy three and one-half pounds of rice and that the boy brought back only seventy-seven cents and told her that the

grocer insisted that he gave him a one-dollar bill, as the child's story was pure hearsay. *Meaney v. Yoyzian*, 159 N. Y. S. 851.

In an action for the purchase price of certain copper oxide, which defendant claimed was not of the required quality, plaintiff showed that a part of these goods which had been returned by the defendant had been sold to other customers who made no complaint as to their quality. The Appellate Division held that the fact that these other customers had made no complaint as to the quality of the goods was purely hearsay evidence upon the quality and that the trial court erred in allowing this proof to be made over defendant's objection and exception. *Thomson Co. v. International Composition Co.*, 191 App. Div. 553, 181 N. Y. S. 637.

Testimony of an employee in a contractor's office that it was the superintendent's practice to go to the city department and make oral requests for anything he wanted before writing a letter was held inadmissible as hearsay. *Uvalde Asphalt Paving Co. v. City of New York*, 196 App. Div. 740, 188 N. Y. S. 304.

Testimony as to conversation with the captain as to the cause of damage to a ship was held inadmissible as hearsay. *Mississippi Shipbuilding Corp. v. Lever Brothers' Co.*, 237 N. Y. 1, 142 N. E. 332.

Evidence that the drawee told the holder, at the time of presenting drafts, that the drawer had notified him not to pay them, was held hearsay. *Mazukiewicz v. Hanover National Bank*, 240 N. Y. 317, 148 N. E. 535.

#### **§ 244. Hearsay Applies to Written as well as Spoken Words.**

The Hearsay Rule may apply to what is written, as well as to what is spoken. Thus, upon the issue of the insanity of the witness's mother, it was held error to permit the son to testify that while he was in Central America he received a letter from his mother's physician stating that his mother was in such condition that she should be put in an asylum at once, as the letter was hearsay. *Boschen v. Stockwell*,

224 N. Y. 356, 120 N. E. 728. Again, in an action for damages for goods claimed by defendant to have been lost in transportation from plaintiff's place of business to the pier of a steamship company, the manifest of the steamship company, showing that only two of the three cases shipped by plaintiff had been received, and also a letter from the consignee stating that the particular case in question had not been received and that the bill of lading recited "one case short," were held inadmissible as hearsay evidence. *Gladium Co. v. Standard Forwarding Co.*, 172 N. Y. S. 487.

### § 245. May Include Sworn Statements.

Hearsay evidence may include statements made under oath. Thus, a voluntary or *ex parte* affidavit may rank in equal grade with other hearsay testimony. *Bookman v. Stegman*, 105 N. Y. 621, 11 N. E. 376.

## APPARENT EXCEPTIONS TO THE RULE AGAINST HEARSAY

### § 246. Statements in Issue.

Where the fact in dispute is the making of a statement, as distinguished from its truth or falsity, evidence that such statement was made is original evidence, and not hearsay. In such cases the Hearsay Rule has no application, because the statements are not used as testimonial assertions, *i. e.*, to prove the truth of the statements.

### § 247. Libel and Slander.

Thus, in libel and slander suits, where the making of the statement is denied, the principal fact in issue is the making of the statement, and the testimony of any witness who heard the statement made is direct and original evidence of the fact. Also, where punitive damages are sought, the defendant is entitled to disprove actual malice by showing the source of his information in publishing the libel, and for this purpose statements of third persons made to the defendant or to an agent who was sent to investigate the matter constitute original evidence. *Osterheld v. Star Co.*,

146 App. Div. 388, 398, 131 N. Y. S. 247; *Kohn v. P. & D. Pub. Co.*, 169 App. Div. 580, 155 N. Y. S. 455; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 184 Pac. 672, 12 A. L. R. 1007, 1023; *Bishop v. New York Times Co.*, 233 N. Y. 446, 135 N. E. 845. But where defendant has published a libelous statement received from its correspondent, without any knowledge on the subject or inquiry into its truth, evidence of information given to the correspondent which was not known to defendant at the time of the publication of the libel will be excluded. *Morey v. M. J. Association*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621.

#### **§ 248. Malicious Prosecution.**

In determining whether there was probable cause in an action for malicious prosecution, the information upon which the defendant acted, though consisting of unsworn statements of others, is original, and not hearsay. *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Heyne v. Blair*, 62 N. Y. 19; *Mulder v. U. S. Slicing Machine Co.*, 228 N. Y. 88, 126 N. E. 517.

#### **§ 249. Parol Contracts.**

Proof of parol contracts may be made by third parties who heard the statements of the contracting parties. Such evidence is not hearsay. *Blanchard v. Child*, 7 Gray (Mass.) 155.

#### **§ 250. Statement Showing Condition of Speaker's Mind.**

Upon the issue of sanity, anything said by the person whose sanity is in question may be proved by any witness who heard the words spoken. A person's conversation will indicate his normal or abnormal mental condition quite as clearly as his conduct. Declarations used for this purpose are original and not hearsay evidence. *State v. Cooper*, 170 N. C. 719, 87 S. E. 50; *People v. Nino*, 149 N. Y. 317, 326, 43 N. E. 853; *Waterman v. Whitney*, 11 N. Y. 517, 62 Am. Dec. 71, *Richardson's Cases in Evidence*, p. 525.



**§ 251. Declarations Showing Knowledge.**

Whenever it is material to prove a person's knowledge or ignorance of a certain fact, his declarations showing knowledge or absence of knowledge on the subject may be shown as original evidence of what was passing in his mind at the time of making the declarations. *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186, 20 Am. Rep. 522. Similarly, unsworn statements of others as to the existence of a fact, made to the person whose knowledge of that fact is in question, may be shown as original evidence to establish the fact of knowledge. 22 C. J., p. 284.

**§ 252. Threats.**

In all cases where it is relevant to prove that threats were made, as bearing on the question of which party was the aggressor or as bearing on the state of mind of one who claims to have acted in self-defense, such threats are original evidence and may be proved by any witness who heard them. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492, *Richardson's Cases in Evidence*, p. 221; *People v. Taylor*, 177 N. Y. 237, 69 N. E. 534; *Faurie v. Lazelle*, 205 N. Y. 526, 99 N. E. 80.

**§ 253. General Reputation.**

A person's character is established by his general reputation, and general reputation rests upon what has been said in the community and, thus, has its basis in hearsay. The general reputation itself is a question of fact, and the evidence of such fact is said to be original and not hearsay. But a witness would not be permitted to state what he heard others say in regard to the reputation of a person. After showing knowledge of reputation, the witness may state what it is. *Dollner v. Lintz*, 84 N. Y. 669; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718, *Richardson's Cases in Evidence*, p. 109. For a complete statement of the rule, see *Walker v. Moors*, 122 Mass. 501.

## CHAPTER XI.

### REAL EXCEPTIONS TO HEARSAY RULE

#### § 254. Exceptions.

The real exceptions to the rule excluding hearsay evidence may be classified as follows :

1. Declarations concerning pedigree.
2. Book entries, including (a) entries admissible under The Shop Book Rule and (b) entries made in the regular course of business.
3. Declarations against interest.
4. Dying declarations.
5. Matters of public or general interest.
6. Declarations which are a part of the *res gestae*,—spontaneous utterances.
7. Declarations of a testator.
8. Declarations of pain and suffering.
9. Declarations of intention.
10. Declarations of reason, motive, and feeling.
11. Declarations of complainant in rape cases.
12. Commercial reports to prove market value.
13. Statistical tables.
14. Workmen's Compensation and Arbitration.

#### § 255. Reasons for Exceptions.

Generally it may be said that the reasons for the exceptions to the rule which forbids hearsay evidence are (a) the necessity of the case, due to the difficulty of obtaining other proof, and (b) the circumstantial guarantee of trustworthiness, arising from the circumstances under which the declarations were made. Greenleaf on Ev., 16th Ed., sec. 114a.

#### § 256. Declarations as to Pedigree. Pedigree Defined.

Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and embraces matters relating to (a)

relationship, (b) descent, (c) birth, (d) marriage, and (e) death. The declarations may "extend to any inquiry involving these events, or which tend to show that either, some or all of them took place or did not." *Washington v. Bank for Savings*, 171 N. Y. 166, 175, 63 N. E. 831, *Richardson's Cases in Evidence*, p. 380; *Eisenlord v. Clum*, 126 N. Y. 552, 564, 27 N. E. 1024, *Richardson's Cases in Evidence*, p. 375. The case of *Washington v. Bank for Savings*, *supra*, furnishes an illustration of the admissibility of hearsay declarations to establish the non-existence of a fact of pedigree. In that case the intestate had opened certain savings bank accounts "in trust for son Thomas" and "in trust for son John." To prove that these names represented fictitious persons, neighbors of the intestate were permitted to testify that she had often told them that she had no children and no family or relatives and that she never had any children. Again, in an action involving the right of one claiming to be decedent's widow to share in his estate, the decedent's last federal income tax return, verified by him, in which he stated that he was single, was held admissible. *Farmers' Loan & Trust Co. v. Wagstaff*, 194 App. Div. 757, 185 N. Y. S. 812.

### § 257. Reasons for Exception.

Hearsay evidence as to matters of pedigree is admitted, because in many instances it would be impossible to establish questions of descent by the testimony of witnesses who have personal knowledge of the facts. "Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of the truth." *Starkie on Ev.*, p. 47.

*Walsh v. Peo.* 211 N.Y. 406, 412, 105 N.E. 647, 648, 4 RA 1915 D 215

ESSENTIALS

1. The declarant must be dead.
2. The declarant must be related by blood or affinity to the family concerning which he speaks.

3. The declarations must be shown to have been made *ante litem motam*.

**§ 258. Declarant Must Be Dead.**

The rule in most jurisdictions is that declarations as to pedigree are not admissible unless the declarant is shown to be dead, although this rule is sometimes relaxed to the extent of receiving such declarations where the declarant is insane or beyond the jurisdiction of the court. 22 C. J., p. 247. The authorities in this state are in conflict upon the admissibility in evidence of declarations as to pedigree made by one who is living but beyond the jurisdiction of the court. In *Nolan v. Nolan*, 35 App. Div. 339, 54 N. Y. S. 975, the Appellate Division held definitely that the declarant must be dead. The Court said, at p. 341: "It is clear that the trial court was right in refusing to receive testimony that the father of Eakins had said that he was dead. There was no proof or suggestion that the father was not alive and available as a witness to the fact of his son's death, if his son was dead at the time of the trial, and it is well settled that the declaration of a living person as to such a fact as this cannot be received in lieu of his sworn testimony as a witness in the cause. If the father of Eakins could testify to the death of his son, nothing could be simpler than to take his testimony by commission in Illinois."

In *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, *Richardson's Cases in Evidence*, p. 392, the Court of Appeals evidently took a contrary view, and the only question is whether the expression of opinion on that point was necessary to the decision so as to have the effect of overruling *Nolan v. Nolan*, *supra*. In *Young v. Shulenberg*, *supra*, the Court made the following statement of the law, at p. 388: "Before the declarations can be received, however, as evidence of pedigree, it must appear that the person making them was a member of the family and that he is dead, incompetent, or beyond the jurisdiction of the court." In that case the declarant, Anne Ellice, was a resident of England at the time of making the declarations in question and

it also appeared that, if living at the time of the trial, she would be more than a hundred years old. In holding her declarations admissible, the Court said, at p. 389:

“As continuity of residence is presumed in the absence of evidence, we must assume that Anne Ellice, if living at the time of the trial, was beyond the jurisdiction of the court; but owing to the long lapse of time the presumption is that she was not then alive.” The Court went on to discuss the strong presumption in favor of her death at such length that it is clear that her declarations were received upon that ground rather than upon the ground of absence from the jurisdiction, although in the opinion of the Court, either ground would sustain the ruling.

### § 259. Relationship.

The declarant must be related either by blood or affinity to the family concerning which he speaks. Slight proof of the relationship will be held sufficient, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy, but there must be some independent proof of this fact other than the declarations themselves in order to render the declarations admissible. *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, *Richardson's Cases in Evidence*, p. 392; *Aalholm v. People*, 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915D 215, *Richardson's Cases in Evidence*, p. 385; *Matter of Perkins*, 174 App. Div. 191, 160 N. Y. S. 54. The importance of this prerequisite is well illustrated in the case of *Aalholm v. People*, *supra*. In that case the estate of one William Kenneally had been turned over to the State because no person entitled to the property could be found. Plaintiff sought to establish his claim as a half brother of the testator. The testator was shown to have been a son of one Sergeant John Kenneally. Plaintiff testified that his mother, long since dead, had often told him that she was the second wife of Sergeant John Kenneally. He also called his nieces and nephews to testify that their deceased mother, plaintiff's sister, had told them the same story, which she in turn had



heard from her mother. The details of residence, family history, etc., brought out in these narratives, corresponded exactly with the known facts concerning the testator's father. The Court of Appeals held, however, that these declarations were inadmissible because there was no independent evidence of the relationship of plaintiff's mother to the Kenneally family.

### § 260. Before Litigation.

The declarations of the deceased to be receivable, must have been made *ante litem motam*; i. e., before the controversy arose, at a time when there was no motive to distort the truth. 22 C. J., p. 246; Aalholm v. People, 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915D 215, Richardson's Cases in Evidence, p. 385.

### § 261. Matters of Pedigree in Issue.

A case is not, necessarily, one of pedigree merely because it may involve questions of birth, age, parentage, or relationship. To bring it within the exception admitting hearsay evidence, the questions or matters of pedigree must be in issue, and not merely incidental thereto. If the litigation is simply to establish a debt or a person's liability on a contract, the case is not one of pedigree, although questions of birth, relationship, etc., may arise. Thus, in proof of the plea of infancy as a defense to an action on a promissory note, hearsay is inadmissible. Bowen v. Preferred Accident Ins. Co., 68 App. Div. 342, 74 N. Y. S. 101. See, also, Eisenlord v. Clum, 126 N. Y. 552, 566, 27 N. E. 1024, Richardson's Cases in Evidence, p. 375. The general rule is that declarations of deceased members of the family of either the father or the mother may be received to establish illegitimacy as well as legitimacy. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808, Richardson's Cases in Evidence, p. 395.

### § 262. Declarations Need Not Be Upon Knowledge of Declarant.

"The declarations to be admissible need not be upon the

knowledge of the declarant. If this was so the main object of permitting hearsay evidence would be frustrated, as it seldom happens that the declarations of deceased relations embrace matters within their own personal knowledge. Thus, evidence that a deceased member of the family said that he heard from others of his family the facts which he states is admissible." *Eisenlord v. Clum*, 126 N. Y. 552, 564, 27 N. E. 1024, *Richardson's Cases in Evidence*, p. 375.

### § 263. Form of Declarations.

The hearsay declarations of deceased persons may be in a very great variety of forms. They may consist of conduct, and recognition of writings or inscriptions, as well as of spoken words. "Thus, an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative, is regarded as a declaration of such parent or relative in a matter of pedigree. . . . Inscriptions on tombstones and other funeral monuments, engravings on rings, inscriptions on family portraits, charts, or pedigrees, and the like, are also admissible, as original evidence of the same fact." *Greenleaf on Ev.*, 16th Ed., sec. 114d. Such declarations, if publicly exhibited, are admitted upon the ground of common assent. It is presumed that the members of the family would not permit a false inscription to remain without protest, and that one would not wear a ring with an error on it. The conduct of relatives and the mode of treatment of those whose pedigree is in question is admissible. For instance, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." *Greenleaf on Ev.*, 16th Ed., sec. 114d.

### § 264. Weight of Declarations.

Although hearsay declarations as to pedigree may be open to every suspicion, yet this is not ground for their rejection. *Eisenlord v. Clum*, 126 N. Y. 552, 567, 27 N. E. 1024, *Rich-*

ardson's Cases in Evidence, p. 375. "Family pride may have tempted the declarant to allege or deny a relationship contrary to the fact; and although persons may be presumed to know the facts connected with their own family history, yet, as is well known, this presumption is often contrary to the fact. Moreover, it is evident that prejudicial and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and that they can do so with comparative impunity from exposure or punishment." Jones on Ev., sec. 317.

## CHAPTER XII.

### BOOK ENTRIES

#### § 265. Generally.

Declarations in the form of book entries made in the regular course of business, though purely hearsay evidence, are, under certain conditions, admissible. They are treated as an exception to the rule against hearsay, and are admitted on the ground of necessity and because the fact of their having been made in the regular course of business carries with it some guarantee of trustworthiness. The exception embraces two classes of book entries; first, shop book entries, which are made in the books of the parties to the action by the parties themselves; and secondly, entries made in the regular course of business by those not parties to the action. While these two classes are closely related in principle, they are not identical, for the requisites for their admission as evidence are not the same. The former is admitted under the Shop Book Rule; the latter, as entries made in the regular course of business. In both cases, where the requirements for admission are fully met, the books become primary and independent evidence. This use of shop books as primary evidence must be carefully distinguished from the rule allowing entries in account books to be used to refresh the recollections of a witness who made them, or, when they fail to refresh his recollection, to be read in evidence, if he will testify that the entries were correct when made. In such cases, the books of account are used as merely auxiliary evidence.

### THE SHOP BOOK RULE

#### § 266. The Rule.

To permit books of account to be given in evidence in favor of the party whose books they are and who made the entries, it must appear

1. That the party kept no clerk;
2. That some of the articles charged have been delivered;
3. That the books produced are the account books of the party;
4. That he keeps fair and honest accounts, and this by those who have dealt and settled with him.

The rule is thus stated in the leading case of *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461, *Richardson's Cases in Evidence*, p. 401, and has been closely followed in this state down to the present time. *Swan v. Warner*, 197 N. Y. 190, 90 N. E. 430.

#### **§ 267. Reasons for Rule.**

The Shop Book Rule is based upon necessity (a) because when the rule was adopted, a party in interest could not testify in his own behalf, and (b) because conditions may arise which leave a party without other evidence than his own statement in books.

Although the Shop Book Rule was established at a time when parties to an action were not allowed to be witnesses, the subsequent legislation (Civil Practice Act, sec. 346) which removed that disqualification and authorized parties to testify in their own behalf has not deprived them of the right to introduce their books of account in evidence. *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42; *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545, *Richardson's Cases in Evidence*, p. 402.

#### **§ 268. Application of the Shop Book Rule.**

The Shop Book Rule "was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services." *Smith v. Rentz*, 131 N. Y. 169, 176, 30 N. E. 54, 15 L. R. A. 138. In *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42, 44, the Court said that the rule applied to books of the "farmer, mechanic, professional man, or merchant." An attorney's book of accounts may be introduced in evi-



dence under the Shop Book Rule; also, the account of a physician. *Rexford v. Comstock*, 3 N. Y. S. 876; *Foster v. Coleman*, 1 E. D. Smith (N. Y.) 85. But the rule was not applied in a broker's action against his principal. *Rathborne v. Hatch*, 80 App. Div. 115, 80 N. Y. S. 347. The rule is not applicable to the business of a corporation. *Congdon & Aylesworth Co. v. Sheehan*, 11 App. Div. 456, 42 N. Y. S. 255.

#### § 269. Nature of Transactions.

The records in the books must relate to sales and services. Cash loans or other cash transactions cannot be proved under the Shop Book Rule by stub entries in a check book or cash book entries. *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138, *Richardson's Cases in Evidence*, p. 353; *Simons v. Steele*, 82 App. Div. 202, 81 N. Y. S. 737.

#### § 270. Single Transactions.

The books are not admissible for single transactions, as in such cases there exist no regular dealings between the parties. *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461, *Richardson's Cases in Evidence*, p. 401; *Corning v. Ashley*, 4 Denio (N. Y.) 354.

#### § 271. Death of Party Not Essential.

The Shop Book Rule has no connection with the rules which relate to the declarations of deceased persons. The party whose books are offered in evidence may be in court. On the other hand, his death or insanity does not render the entries inadmissible. *Holbrook v. Gay*, 6 Cush. (Mass.) 215. The entries, however, must be properly authenticated by the bookkeeper, or, in case of his death or other disability, by proof of his handwriting. 22 C. J., p. 865.

#### § 272. Effect of Death of Adverse Party.

The Civil Practice Act, sec. 347, which provides that a party or person interested in an action shall not be ex-

amined as a witness in his own interest against the personal representatives of a deceased person concerning a personal transaction with the deceased, does not preclude such a person from putting his account books in evidence under the Shop Book Rule, for the reason that the books are primary and independent evidence, and it is only the witness who is disqualified under this section. *Young v. Luce*, 21 N. Y. S. 225. But it has been held that the testimony of such a party may not be used to supply the necessary preliminary proof required for the admission of the books. *Davis v. Seaman*, 64 Hun 572, 19 N. Y. S. 260. In *Bellows v. Bender*, 87 Misc. 187, 149 N. Y. S. 548, *Richardson's Cases in Evidence*, p. 844, the Court expressed the opinion that a party is not disqualified under section 347 from taking the stand and identifying his book of accounts and testifying that he kept no clerk and that it was his custom to make regular entries in these books in the usual course of business, but held that such a party should not be permitted to testify concerning the account with the deceased or anything pertaining thereto. Such evidence may, of course, be supplied by other witnesses. The Court said, at p. 193:

“Where it becomes necessary for a party to identify his books of accounts and to testify that he kept no clerk and that his custom was to make entries therein in the usual course of business, with regularity, I see no reason why such testimony should be regarded as circumventing section 829 of the Code of Civil Procedure. (Civil Practice Act, sec. 347.) Standing alone it proves nothing, for such testimony by a party is but preliminary to the more important testimony of persons who settled their accounts with him by his books. In the case of a physician, the book should show visits to patients, regularly entered in the course of professional duties; their total number furnishes a basis for proof by other physicians of value according to the accustomed charges in the locality, and when coupled with independent evidence that some of the visits were actually made and that other patients had settled their accounts with the physician from his books, the entries of his visits or at-

tendance upon them therein stated being correct and true, a physician's book of visits is then open for the inspection of the court, and, if found free from suspicion and sufficiently orderly to convey intelligence upon perusal, the book becomes competent evidence of the visits before the court or jury, as the case may be."

See cases collected in 6 A. L. R. 757, note.

### PRELIMINARY PROOF

#### § 273. Necessity of Preliminary Proof.

A proper foundation must be laid, before the shop books are offered in evidence, by proof that the essentials of the rule, as laid down in *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461, have been met.

#### § 274. Party Kept No Clerk.

The necessity for showing that the party had no clerk has led to considerable discussion of what constitutes a "clerk" within this rule. Under present conditions this requirement seems highly technical but it can be readily understood in the light of the conditions existing at the time when the rule originated. It must be remembered that a party was then entirely disqualified from testifying in his own behalf. Unless he had someone who could testify for him, he had no means of proving his case. The Shop Book Rule was evolved to meet this necessity. The books were received in evidence only in aid of those who had no other means of proof. If the merchant or professional man had a clerk who had sufficient knowledge of the facts to enable him to testify for him, he did not fall within this class. A clerk, therefore, is one who has such general knowledge of the business as would enable him to testify concerning the transactions in question. In holding that one who occupies the isolated position of bookkeeper is not a clerk, the Court of Appeals said, in *McGoldrick v. Traphagen*, 88 N. Y. 334, *Richardson's Cases in Evidence*, p. 404:

"The clerk intended was one who had something to do

with and had knowledge generally of the business of his employer in reference to goods sold or work done, so that he could testify on that subject. It evidently means an employee whose duty it is to attend to the details of business and thus is able to prove an account, and not one who from his isolated position as a bookkeeper, can have but little means of knowledge personally as to the transactions done, or information relating thereto, except what is mainly derived from others." See, also, *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, fully annotated 52 L. R. A. 545, *Richardson's Cases in Evidence*, p. 402; *Van Name v. Barber*, 115 App. Div. 593, 100 N. Y. S. 987. In the recent case of *Shmargon v. Rosenstein*, 192 App. Div. 143, 182 N. Y. S. 343, the Appellate Division has attempted to extend the rule somewhat in order to render it applicable to modern business methods. The plaintiff was a retail dealer in groceries and meats. He kept three clerks. The books of account which plaintiff introduced in evidence consisted of day books and ledgers, the entries in which were regularly made from sales slips upon which it was the practice of the plaintiff and his clerks to note sales and deliveries as made. Plaintiff's evidence fully satisfied all of the requirements laid down in *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461, except the condition with respect to keeping no clerk. In discussing this condition the Court said, at p. 461.

"In the case of a small trader having not more than one employee, the 'no clerk' conditions as interpreted by the *McGoldrick* decision presents no difficulty. The case which now frequently arises is that of an employer having a number of employees, each of whom has knowledge *specialty* of a part of the business of his employer, none of whom has knowledge 'generally' of that business as a whole. In such a case does a party employ 'no clerk,' so that his books are arbitrarily receivable, in spite of the fact that in reference to many of the items recorded an employee might give direct testimony? Or is such an employee a 'clerk' within the meaning of the condition, because his knowledge in refer-



ence to particular items is to that extent *general*, so that the books are wholly inadmissible? It seems to me that neither result need follow. Having regard to the principle of necessity, which gave rise to the shop book exception and restricted its use to cases where direct testimony was unavailable, the rule must be that, in all cases of the character assumed, the books are receivable, provided the knowledge of the clerks, as to a part of the transactions recorded or as to the correctness of some of the entries, if available, is first exhausted."

Under the ruling in this case, then, it appears that if the party kept several clerks, each of whom was acquainted with some part of the business or had personal knowledge of some of the transportations involved, these clerks must first be called and examined, after which the account books will be received in evidence.

**§ 275. That Some of the Articles Charged Have Been Delivered.**

This requirement is satisfied by showing that some of the articles, etc., were delivered, or that some of the services were actually rendered. This proof must be independent of the books. The evident purpose of this requirement is that there shall be some proof of at least some part of the account before the account books are admitted as proof of the balance. Proof of a single item would be sufficient. *Conklin v. Stammler*, 2 Hilt. (N. Y.) 422; 17 How. Pr. (N. Y.) 399; *Morrill v. Whitehead*, 4 E. D. Smith (N. Y.) 239; *Swan v. Warner*, 197 N. Y. 190, 90 N. E. 430.

**§ 276. That the Books Produced are the Account Books of the Party.**

There can be no difficulty in satisfying the requirement that the books produced are the account books of the party. This is usually proved by the testimony of the party himself. If he is dead or incompetent, his bookkeeper or anyone familiar with his habits of doing business may identify the books. The rule requires the production of the books of



original entry. What are books of original entry? The rule is satisfied if the account book sought to be introduced is shown to be the first permanent record of the transactions in question, if made within a reasonably short time after the transactions themselves, although the items may have been taken from some temporary memoranda upon a slate, day-book, or slip of paper. See cases collected in 52 L. R. A. 576, note. Thus, where the entries were first made on slips of paper or on a slate by the person doing the work or making the delivery, and then transferred to the books by the party or by his bookkeeper, the books to which such entries were transferred constitute books of original entry. *McGoldrick v. Traphagen*, 88 N. Y. 334, *Richardson's Cases in Evidence*, p. 404. Again, where the entries in an account book were made from an order book in which were recorded solicited orders by an employee, whose duty it was to secure such orders and deliver the goods, it was held that the account book was a book of original entry. *Van Name v. Barber*, 115 App. Div. 593, 100 N. Y. S. 987. It must be shown, however, that the entries were correctly made. *Hurley v. Macey*, 94 App. Div. 9, 87 N. Y. S. 924; *Shmar-gon v. Rosenstein*, 192 App. Div. 143, 182 N. Y. S. 343.

Where the original account or a portion of it has been lost or destroyed, a copy is admissible as secondary evidence. It must, of course, be satisfactorily shown that the copy is a correct copy of the account. *Hodnett v. Gault*, 64 App. Div. 163, 71 N. Y. S. 831.

**§ 277. That He (the party) Keeps Fair and Honest Accounts, and This by Those Who Have Dealt and Settled with Him.**

There must be some evidence by those who have dealt with the party whose books are offered in evidence that he keeps honest books of account. But the testimony of one witness is sufficient for this purpose. There is some question, however, as to the exact nature of the testimony required to satisfy this condition. Many cases hold that a strict application of the rule requires that the witness must

be able to testify that he has settled his accounts by the books and found them correct, and not merely that he has received bills and paid them, believing them to be correct or relying upon the honesty of the party who rendered them. *McGoldrick v. Traphagen*, 88 N. Y. 334, *Richardson's Cases in Evidence*, p. 404; *Beatty v. Clark*, 44 Hun 126; *Walbridge v. Simon*, 13 Misc. 634, 34 N. Y. S. 939; *Powell v. Murphy*, 18 App. Div. 25, 45 N. Y. S. 374, *Richardson's Cases in Evidence*, p. 420; *Wright v. Hicks*, 61 App. Div. 489, 70 N. Y. S. 675. As it seldom happens that customers actually see the books, this distinction becomes of great practical importance to the party who seeks to introduce his books in evidence under the Shop Book Rule. The Court of Appeals has held that the rule was satisfied by testimony of a bookkeeper for a firm that had purchased coal from the plaintiff on credit that he had "settled with him according to his books and according to our own four or five times and always found them to be correct." *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, fully annotated 52 L. R. A. 545, *Richardson's Cases in Evidence*, p. 402; also that the rule was sufficiently complied with by testimony of plaintiff's own bookkeeper that he himself had an account with the plaintiff which he has settled from the books and found them to be correct. *McGoldrick v. Traphagen*, *supra*.

### § 278. Weight of Books as Evidence.

The reception of the books in evidence is not conclusive of their contents. Their trustworthiness is to be tested and weighed the same as other evidence. The New York Court of Appeals has said: "As evidence, which is manufactured by the party, they should be received with caution; but that is an objection which goes to the weight of evidence and not to its admissibility which is to be determined solely with reference to the foundation which has been laid for it. Their admission in evidence is, of course, not authoritative as to their contents; for the conclusion as to their credit will depend upon their appearance, the manner of their keeping, and the character of him who offers them." *Smith v.*

Smith, 163 N. Y. 168, 171, 57 N. E. 300, 52 L. R. A. 545, Richardson's Cases in Evidence, p. 402. It is, therefore, open to the party against whom account books are put in evidence to impeach their incredibility in any way he can or to contradict them. Lloyd v. Lloyd, 1 Redf. (N. Y.) 399; Morrill v. Whitehead, 4 E. D. Smith (N. Y.) 239.

#### ENTRIES MADE IN THE REGULAR COURSE OF BUSINESS

##### § 279. Entries.

Entries in the regular course of business will be dealt with under three headings:

1. The common law rule, which is still the prevailing rule in the United States;
2. The newly enacted Statutory Rule in New York;
3. The Federal Rule.

##### § 280. Reasons for Rule.

There are several important classes of book entries which, although inadmissible under the Shop Book Rule, are surrounded by quite as many guarantees of trustworthiness and for which the necessity of admission in evidence is fully as great as those coming under the Shop Book Rule. Example of these are found in the various bookkeeping systems of large business organizations employing dozens or hundred of clerks, each of whom performs some small routine duty and no one of whom has personal knowledge of the business as a whole; in the priest's registers of marriages and baptisms; in the sheets of train dispatchers; the books of banks; and countless other illustrations taken from the complicated business world of to-day. Such entries are ordinarily made pursuant to an established business routine by persons who, at the time, may have no motive to falsify and are frequently the only available means of proving the facts therein stated. From these reasons for this exception to the Hearsay Rule are developed certain requirements and limitations.

**§ 281. The Rule.**

To permit book entries to be introduced in evidence under this rule it must appear

1. That the entry was made in the regular course of business;

2. By one in the discharge of his duty or in the regular course of his employment or business;

3. At or reasonably near the time when the recorded transaction or event occurred; and

4. That the entrant had personal knowledge of the facts recorded or that the information was communicated to the entrant by one who had such personal knowledge and whose duty it was to make such report to the entrant.

The rule is clearly stated and its application well illustrated in the leading case of *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, *Richardson's Cases in Evidence*, p. 412. *State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1, *Richardson's Cases in Evidence*, p. 417, furnishes an excellent illustration of a case in which book entries were held inadmissible simply because no proper foundation had been laid by the party seeking to introduce them in evidence. Upon a subsequent trial the necessary conditions precedent to the admission of the books were complied with and the books were properly received in evidence. *State Bank of Pike v. Brown*, 96 App. Div. 441, 89 N. Y. S. 381, *aff'd* 184 N. Y. 517.

The four principal requirements which must be met before book entries can be introduced under this rule will be discussed separately.

**§ 282. Regular Course of Business.**

The entry must have been made in the regular course of business, *i. e.*, the regular routine followed in the daily conduct of business. But there is no limitation as to the nature of the business or occupation. As has been stated, "An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the

course of his secular occupation." *Kennedy v. Doyle*, 10 Allen (Mass.) 161. Therefore, a register of marriages, kept by a priest or minister, as well as entries made by merchants, clerks, bank tellers, etc., is admissible. "It is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it." *Fisher v. Mayor*, 67 N. Y. 73.

### § 283. Duty to Make Entry.

The entry must have been made by a person in the discharge of his duty or in the regular course of his business or employment and must be a part of a system of entries, as distinguished from entries made casually. Thus, a private memorandum, a written report on a railroad accident by an employee to his employer, or an entry made in an account book, not used for ten years, does not satisfy the requirements of the rule as to regularity. *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 581, 7 N. E. 905, *Richardson's Cases in Evidence*, p. 412; *Kibbe v. Bancroft*, 77 Ill. 18.

### § 284. Time of Making Entry.

The entries must be made at or reasonably near the time the transaction occurred. No precise time is fixed by the rule. What constitutes a reasonable time depends upon the circumstances. The purpose of this requirement is to insure accuracy of recollection at the time the record is made. *Barker v. Haskell*, 9 Cush. (Mass.) 218; *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461, 59 Atl. 499.

### § 285. Personal Knowledge of Entrant.

It must be made to appear that the person making the entry had personal knowledge of the facts recorded, or that information was communicated to the entrant by one engaged in the business, and who had personal knowledge, and whose duty it was to transact the business and make a report thereof to the person making the entry. Thus, if A testifies that he made the entries in accordance with statements made to him by B, and B testifies that such state-



ments were true, the entries are admissible, though A has no personal knowledge of the facts reported. The courts of this state are most strict, however, in insisting that every link in the chain of testimony be supplied so that it definitely appears that each item included in the book entries, sought to be introduced in evidence, was supplied by one who had personal knowledge of the facts. The case of *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, *Richardson's Cases in Evidence*, p. 412, is exactly in point. To prove the number of days' work performed and the quantity of material used in the repair of a street, the plaintiff offered in evidence a time book and a written account of material kept by the head foreman. With respect to the time book, the head foreman testified that the entries therein were correctly made by him upon the report to him of the facts twice each day by two gang foremen. The two gang foremen, in turn, testified that they had never seen the entries but that they were in charge of the laborers and that they had correctly reported to the head foreman each day the names of the men who worked and the number of hours which each man had worked. This chain of testimony was held a sufficient foundation for the admission of the time book in evidence. With respect to the account of material, however, it appeared that a part of the items were furnished to the head foreman by one of the two gang foremen, who testified that he had no personal knowledge of the amount of stone which had been delivered but that he had accepted the count of the carman and that his reports to the head foreman were based upon the reports of the carman to him. The Court of Appeals pointed out that, as the carman was not called to testify, the testimony of the head foreman and the gang foreman with respect to these items were mere hearsay and therefore this portion of the account of materials was not strictly admissible. See, also, *Rathborne v. Hatch*, 90 App. Div. 151, 85 N. Y. S. 768, *aff'd* 181 N. Y. 520, 73 N. E. 1131; *Pneumatic Signal Co. v. Texas & P. Ry. Co.*, 216 N. Y. 374, 110 N. E. 771; *Kent v. Garvin*, 1 Grey (Mass.) 148.

**§ 286. Effect of Death of Entrant or Informant.**

Where the person who made the entries is dead, the entries will be received in evidence upon proof of the deceased's handwriting, together with evidence that the entries were made by the deceased in the regular course of his business or employment. But if the deceased entrant was without personal knowledge of the facts recorded, his death does not dispense with the requirement of the testimony of those who reported the facts to him. *Collins v. Carlin*, 106 App. Div. 204, 94 N. Y. S. 317. If, on the other hand, the person who furnished the information to the entrant is dead, the entries will be admitted upon the testimony of the entrant that they were made by him in the regular course of business and that they correctly represent the report of the deceased informant. *American Surety Co. v. Pauly*, 72 Fed. 470, aff'd 170 U. S. 133, 42 Law. Ed. 977, 18 Sup. Ct. Rep. 552. Notwithstanding the death of both entrant and informant, the books or entries may be admitted in evidence upon proof of the regular course of business in accordance with which the entries were made, together with proof of the death of the entrant and of the person or persons who furnished the information to him. If it is shown that the entrant or person furnishing the information has since become insane or that he is beyond the jurisdiction of the court and it is impossible to procure his testimony in any manner, some cases hold that the entries may be verified as in case of death. *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; 22 C. J., p. 884.

**§ 287. Books of Decedent.**

The rule of evidence applicable to entries made by a deceased person is that all entries or memoranda made in the course of his business or duty by anyone who, at the time, would have been a competent witness of the fact which he registers are admissible even against third persons. Thus, a deceased attorney's record of the proceedings in a manner handled by him were held admissible in an action between his client and a third party. *Leland v. Cameron*, 31 N. Y.

115. See, also, *Bentley v. Falker*, 24 App. Div. 560; *Livingston v. Arnoux*, 56 N. Y. 507, 518, *Richardson's Cases in Evidence*, p. 429. The records of a notary public who has died or become insane or removed beyond the jurisdiction of the court so that his testimony cannot be procured are admissible to prove due presentment, demand and notice of protest. Civil Practice Act, sec. 368, sub. 2.

It must appear in every case, however, that the entry sought to be introduced in evidence was within the scope of the business or duty of the entrant and that the facts contained in the entry were within the personal knowledge of the entrant. In the case of *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395, the plaintiffs, for the purpose of proving that certain checks were given by their testator as loans, sought to introduce entries made upon the stubs by the testator's deceased private secretary. The Court of Appeals held these entries inadmissible on the ground that the statement with respect to the nature of the transaction was not required in performing the clerical duty of noting the data of the check to be drawn; and more particularly on the ground that there was no evidence showing, or permitting the inference, that the fact so recorded was within the personal knowledge of the deceased secretary. As the statement was purely hearsay, the secretary, if living, would not be a competent witness to testify to the fact contained therein, and therefore his death could not have the effect of rendering his written memorandum admissible.

### § 288. Production of Original Books.

The best evidence rule applies no less to entries made in the regular course of business than to other writings. *Clark v. Bullock*, 2 N. Y. S. 408. The book entries sought to be introduced in evidence must be shown to be the first permanent record of the transaction involved.

The making of a temporary entry on slips of paper or in a memorandum book, for convenience until a permanent book entry can be made, will not deprive the subsequent entry of its character as an original entry. *Van Wie v.*

Loomis, 77 Hun 399, 28 N. Y. S. 803; *Kent v. Garvin*, 1 Grey (Mass.) 148. Entries on time and material cards, made contemporaneously with doing the work, although not transcribed in a book, are nevertheless admissible as original entries. *N. Y., N. H. & H. R. R. Co. v. Baldwin-Universal Consolidated Co.*, 124 Misc. 651, 207 N. Y. S. 799. Card index and loose leaf systems are admissible as entries in the regular course of business when they constitute the original, permanent or only records. *Haley & Lang Co. v. Del Vecchio*, 36 S. D. 64, 153 N. W. 898.

After a proper foundation has been laid, a copy should be admitted as secondary evidence.

### **§ 289. Book Entries Not Admissible to Prove Contract.**

Book entries are not admissible for the purpose of proving the terms of a special contract. For this purpose they would be mere self-serving declarations in favor of the party offering the books. They are admissible only for the purpose of proving the items of an account or the events which took place in the usual course of business dealings. 22 C. J., p. 878; *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. 957.

## **NEW YORK STATUTE**

### **§ 290. The Statutory Rule in New York.**

The New York statute. The Laws of 1928, Chap. 532, provide for the admissibility of certain records. This chapter amends the Civil Practice Act by adding a new section designated as 374a. Memoranda or records of any act, transaction, occurrence, or event shall be admissible in evidence if the trial judge shall find that it was made in the regular course of business, and that the memorandum was made at the time of such occurrence or event or at a reasonable time thereafter. Lack of personal knowledge by the entrant may be shown to affect the weight of the evidence, but it shall not affect its admissibility. The statute includes every business, profession, occupation, and calling of every kind. It is impossible to predict with accuracy the



changes which the statute makes. It seems certain, however, that the element of personal knowledge previously required, as well as the duty of entrant to make the entries, has been dispensed with. Evidently a problem will be presented as to whether the statute makes it possible for a party to introduce a memorandum of a conversation in which he engaged, for the sole purpose of supporting his own testimony.

### § 291. Federal Rule.

Early federal cases follow the New York common law rule. *Chaffee & Co. v. United States*, 18 Wall. (U. S.) 516, 21 Law. Ed. 908. Recent federal authorities, however, show a marked tendency to relax the rule to some extent, especially in the case of books and records of public service corporations, where the safe conduct of important public utilities depends on the care and accuracy with which the records in question are kept and where the method of keeping books is largely prescribed by public authorities and the books are constantly open to official supervision and inspection. *Consolidated Gas Co. of N. Y. v. Newton*, 267 Fed. 231, 242, aff'd 258 U. S. 165, 66 Law. Ed. 538, 42 Sup. Ct. Rep. 264. The case of *Chesapeake & O. Ry. Co. v. Stojanowski*, 191 Fed. 720, *Richardson's Cases in Evidence*, p. 421, is in point. The question at issue was whether the train from which the plaintiff claimed to have been thrown was, in fact, in the Eagle Mountain station at the time when the plaintiff claimed the accident occurred. Upon this point the defendant offered in evidence its train sheet, showing the arrival and departure of trains at stations upon the day of the accident. It was produced by the train dispatcher, who testified that the entries were in his handwriting; that the movements of trains were reported to him by telephone by the operators at the different stations as the trains arrived and departed, and that he thereupon made the entries in the train sheets; that this work was a part of his regular duty; and that he, as the train dispatcher, controlled the meeting points of trains and in so doing neces-



sarily relied upon the entries in the train sheets. The evidence was objected to on the ground that the various operators who observed the movements of the trains and telephoned the information to the dispatcher had not been called. The Court held that, in view of the fact that the safe conduct of the railroad and the lives of hundreds of people depended on the accuracy of this train sheet and there was, therefore, every incentive to each employee taking part in the accumulation of this information to be sure of its accuracy, the testimony of the train dispatcher alone was a sufficient foundation for the admission of the train sheet in evidence. In the recent case of *Kings County Lighting Co. v. Nixon*, 268 Fed. 143, aff'd 258 U. S. 180, 66 Law. Ed. 550, 42 Sup. Ct. Rep. 268, the Court, in admitting the account books of a gas company, placed its decision upon the broader ground, argued by Professor Wigmore (*Wigmore on Ev.*, sec. 1530), that in cases where many persons have been concerned in the preparation of an account, some of whom may be unknown and others unavailable as witnesses, the practical inconvenience of producing these persons on the witness stand plainly outweighs the probable utility of so doing. This case was followed in the *N. Y. & Queens Gas Co. v. Newton*, 269 Fed. 277, aff'd 258 U. S. 178, 66 Law. Ed. 549, 42 Sup. Ct. Rep. 268, in which the Court used the following language:

"Common law proof of each and every of the thousands of items of the plaintiff's books of accounts would result in a practical denial of justice. The defendants had full facility to examine into and test the accuracy of the books. Capable cross-examination rarely fails to disclose errors, omissions and inaccuracies, and injustice is rarely done in a case like this, where there has been full opportunity for examination."

## CHAPTER XIII.

### DECLARATIONS AGAINST INTEREST

#### § 292. General Rule.

Another exception to the rule excluding hearsay evidence has been broadly stated to be that: "the declarations of a person since deceased, against his interests as well as of other incidental and collateral facts and circumstances contained in it, are admissible in evidence, irrespective of the question whether any privity existed between the declarant and the person against whom it is offered, provided the declarant had peculiar means of knowing the matters stated, that he had no interest to misrepresent it, and that it was opposed to his pecuniary or property interest." *McDonald v. Wesendonck*, 30 Misc. 601, 605, 62 N. Y. S. 764. See, also, *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189, *Richardson's Cases in Evidence*, p. 424; *Tompkins v. Fonda Glove Lining Co.*, 188 N. Y. 261, 80 N. E. 933, *Richardson's Cases in Evidence*, p. 427; *Editorial New York Law Journal*, April 15, 1925.

#### § 293. Reason for Rule.

Here again, as in the other exceptions, we find the reason for the exception based upon the necessity principle and the circumstantial guarantee of trustworthiness. The necessity of the case is the unavailability of the declarant, due to his death; and the circumstantial guarantee is the improbability that a person would make a false statement which would be against his pecuniary interest. It may frequently happen that such statements are the only available means of proof, and because of the presumption of truthfulness of the declarations, are admitted, although the sanction of an oath and the test of cross-examination are wanting.

#### § 294. Requisites of Declaration.

In order that a declaration against interest may be received in evidence, it must appear that

1. The declarant is dead;
2. The declaration was against the pecuniary interest of the declarant, at the time when made;
3. The declarant had competent knowledge of the facts; and
4. There was no probable motive to misrepresent the facts.

### § 295. Death of Declarant.

In this exception, the rule is almost universally stated to be that the declarant must be dead. It would seem that unavailability due to causes other than death might well be recognized, and, in a few cases in other jurisdictions, such declarations have been received upon proof that the declarant was physically or mentally incompetent or unavailable on account of absence from the jurisdiction of the court. Many authorities, however, adopt the strict view that it is only when the declarant is dead that his declarations can be received. 22 C. J., p. 232. The precise question seems never to have been raised in the courts of this state, but the statement is made unqualifiedly in numerous opinions that the declarations of a deceased person are admissible in evidence when shown to have been against the pecuniary interest of the declarant when made. *Tompkins v. Fonda Glove Lining Co.*, 188 N. Y. 261, 80 N. E. 933, *Richardson's Cases in Evidence*, p. 427; *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 180, *Richardson's Cases in Evidence*, p. 424; *N. Y. Water Co. v. Crow*, 110 App. Div. 32, 96 N. Y. S. 899, *aff'd* 187 N. Y. 516, 79 N. E. 1112; *McDonald v. Wesendonck*, 30 Misc. 601, 62 N. Y. S. 764.

### § 296. Against Pecuniary Interest.

The declaration or statement must be against the pecuniary or proprietary interest of the declarant. It must be a money or property interest which is prejudiced by the statement, to bring it within the exception. For example, the declarant may acknowledge his indebtedness to another, or state that nothing is due him from a certain person, or

acknowledge the receipt of money or property, or admit that he has converted funds to his own use, or that he owes more than his apparent share of an obligation, or that he is sole debtor under an instrument which ostensibly binds others as well as himself. These are all illustrations of declarations which are against the pecuniary interest of the declarant at the time when made. For citation of numerous cases illustrating each of these propositions, see Chamberlayne's *Modern Law of Ev.*, Vol. IV., sec. 2774; 22 C. J., p. 233. Similarly, declarations of a deceased person, made when in possession of real property in reference to his title thereto, such as that he has conveyed it by deed or holds it in trust or as a tenant for life, are admissible because they were against the proprietary interest of the declarant at the time when made. *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189, *Richardson's Cases in Evidence*, p. 424; *N. Y. Water Co. v. Crow*, 110 App. Div. 32, 96 N. Y. S. 899, *aff'd* 187 N. Y. 516, 79 N. E. 1112; *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. S. 208, *aff'd* 181 N. Y. 581, 74 N. E. 1119. The same rule applies to declarations of a deceased person in derogation of his apparent title to personal property, except where such declarations are excluded under the rule of *Paige v. Cagwin*, 7 Hill (N. Y.) 361, 42 Am. Dec. 68, which will be discussed in the chapter on Admissions. *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730, 45 L. R. A. (N. S.) 860.

Declarations against interest also include statements affecting a person's right of action arising out of the negligence of another. Thus, declarations of a deceased person as to the cause of an injury which resulted in his death, tending to exculpate his employer from the charge of negligence respecting the injury, are competent against his administratrix. *Dixon v. Union Iron Works*, 90 Minn. 492, 97 N. W. 375; *Georgia Railroad & Banking Co. v. Fitzgerald*, 108 Ga. 507, 34 S. E. 316.

The fact that the declaration alleged to have been made would subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule

against hearsay evidence. *Donnelly v. United States*, 228 U. S. 243, 57 Law. Ed. 830, 33 Sup. Ct. Rep. 449. This is well illustrated by the celebrated *Sussex Peerage Case*, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034, where, for the purpose of proving a marriage, the statements of a clergyman, since deceased, who had performed the ceremony at Rome, were offered in evidence, on the theory that they were against his interest, since they were admissions that he had violated a statute and exposed himself to a prosecution for penalties. The statements were rejected on the ground that the interest of the declarant was not a pecuniary interest within the rule. The Court said: "To say, if a man should confess a felony for which he should be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person is one of the most monstrous and untenable propositions that can be advanced." Many cases have excluded confessions of persons since deceased. *Commonwealth v. Chance*, 174 Mass. 245, 54 N. E. 551; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127; *Donnelly v. United States*, *supra*. Professor Wigmore argues that the doctrine should be extended to include a penal interest. *Wigmore on Ev.*, sec. 1476. See, also, dissenting opinion of Mr. Justice Holmes in *Donnelly v. United States*, *supra*.

"The interest of the declarant must have been so obvious and direct as presumably to have been present in his mind at the time of the declaration." 22 C. J., p. 234. Declarations made prior to acquiring interest, or subsequent to parting with it, are not against interest, because no interest existed at the time the statements were made. *Hutchins v. Hutchins*, 98 N. Y. 56, 64, *Richardson's Cases in Evidence*, p. 444.

In many instances the same declaration may be in favor of the declarant or against his interest, according to the facts existing at the time. For example, if the declarant denied his partnership with another, whether or not the statement constituted a declaration against interest would



depend upon the solvency or insolvency of the firm at the time. Declarations of a deceased policy holder, acknowledging liability on a premium note, were held inadmissible since the suit was on the policy. But if the suit had been on the note against the estate of the maker, the declaration would have been admissible, as being against interest. *Mut. Life Ins. Co. v. Logan*, 87 Fed. 637.

### § 297. Declarant's Knowledge of Facts.

The declaration must be of a fact of which the declarant was personally cognizant. 22 C. J., p. 235.

### § 298. No Motive to Misrepresent the Facts.

Another qualification of this exception to the rule against hearsay evidence is that the declarant must have had no ulterior purpose in making the statements. It must be shown that they were made at a time when there could have been no thought of their subsequent use as evidence. Some authorities hold that the declarations, to be admitted in evidence, must have been made before there was any controversy as to the matter to which they relate. But the better reasoned authorities hold that the true test is not whether the declarations were made *ante litem motam*, but whether they were made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared.

The fact, therefore, that a statement was made after a controversy has begun would not alone be sufficient to exclude it, although it might be a material circumstance to enable the court to determine whether there was any probable motive for the declarant to falsify. The question of motive must be determined by the facts of each particular case. *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn., 18, 91 N. W. 28. The very fact that such declarations must be against interest excludes all thought of a false motive to misrepresent the facts. For example, indorsements of payments on notes, bills, bonds, etc., may be received as

declarations against interest, unless the case is one in which the debt would have been barred by the Statute of Limitations had it not been kept alive by the payment evidenced by the indorsements. In the latter case it is evident that the creditor might find it to his interest to give a false credit for a part of the debt for the purpose of reviving the debtor's obligation to pay the remainder. *Mills v. Davis*, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394, *Richardson's Cases in Evidence*, p. 435.

**§ 299. Statement Admissible for All Facts Contained in It.**

The entire declaration or statement is admissible, even though it includes matter which is collateral and not against interest, and, when admitted, it is evidence as to all facts stated. In the leading case of *Higham v. Ridgway*, 10 East's Rep. 109, 103 Eng. Rep. 717, it was held that the entry of a man-midwife in his books, in the ordinary course of his business, of the birth of a child, accompanied by another entry in his ledger of the charge for the service with a memorandum of payment at a subsequent date, was admissible evidence, of the time of the birth. It was contended that only the word "paid" was admissible. Lord Ellenborough said: "It is idle to say that the word 'paid' only shall be admitted in evidence without the context which explains to what it refers. We must therefore look to the rest of the entry to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory." A written receipt acknowledging the payment of money is not only evidential of that fact between third parties, but also tends to establish the date of payment; from whom it was received; the nature of the claim on which it was paid; and, in the case of a tenant, the amount of rental at which he holds. *Livingston v. Arnoux*, 56 N. Y. 507, *Richardson's Cases in Evidence*, p. 429; *McDonald v. Wesendonck*, 30 Misc. 601, 62 N. Y. S. 764; 22 C. J., p. 237.

**§ 300. Declarant May be in Privity with or Stranger to Litigants.**

The fact that the declarant is in privity with the litigants is immaterial. *Livingston v. Arnoux*, 56 N. Y. 507. In *Smith v. Hanson*, 34 Utah 171, 96 Pac. 1087, the Court said:

"We have been cited to no case where a declaration against interest was excluded because made by a person in privity with the parties. To the contrary, we find numerous cases where such a declaration of a person since deceased was held properly admitted, though the declarant was in privity with the party litigant offering the declaration, and where it was received not as an admission of one identified in interest with a party litigant, but as direct evidence of the fact declared. The following are a few of such cases: *Coffin v. Bucknam*, 12 Me. 471; *Humes v. O'Bryan & Washington*, 74 Ala. 64; *County of Mahashka v. Ingalls*, 16 Iowa 81; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N. E. 1075; *Lehman v. Sherger*, 68 Wis. 145, 31 N. W. 733; *Taylor v. Witham*, 3 Ch. D. 605."

**§ 301. Form of Declaration.**

The declarations against interest may be either oral or written. They may appear in deeds, accounts, memoranda receipts, etc. It is not a condition to their admission that they be made in the regular course of business, hence, they need not be contemporaneous with the act recorded. 22 C. J., p. 236.

## CHAPTER XIV.

### DYING DECLARATIONS

#### § 302. Defined.

Dying declarations form another exception to the rule excluding hearsay evidence and have been thus defined: "Dying declarations are statements of material facts concerning the cause and circumstances of a homicide, made by the victim under a solemn conviction of impending death." 10 Am. & Eng. Enc., p. 360.

#### § 303. Reasons for Exception.

The reasons for admitting dying declarations lie in the necessity, due to the unavailability of the declarant as a witness, and the fact that frequently the declarant and the perpetrator of the crime were the only witnesses to the homicide; and in the guarantee of trustworthiness arising from the circumstance of impending death. "The principle upon which dying declarations are received in evidence is that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations, therefore, of a person dying under such circumstances are considered as equivalent to the evidence of the living witness upon oath." *People v. Sarzano*, 212 N. Y. 231, 106 N. E. 87, *Richardson's Cases in Evidence*, p. 491.

#### § 304. Essential Requirements.

That dying declarations may be admitted as an exception to the Hearsay Rule, which excludes all statements not tested by oath and cross-examination, it must appear

1. That the declarant was *in extremis*;
2. That the declarant was under a sense of impending death, without any hope of recovery; and

3. That the declarant, if living, would be competent as a witness.

**§ 305. Declarant Must be in Extremis.**

Dying declarations, to be admissible as such, must be made *in extremis*,—when the declarant is at the very point of death. *People v. Del Vèrmo*, 192 N. Y. 470, 85 N. E. 690, *Richardson's Cases in Evidence*, p. 448. One traveling around the neighborhood and walking from place to place and not in such extremity as to take to his bed, cannot be said to be *in extremis*. *McLean v. State*, 12 So. (Miss.) 905.

But death need not immediately follow the declaration. "It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." *Greenleaf on Ev.*, 16th Ed., sec. 158. Yet the time elapsing between the declaration and death may serve as an exponent of the deceased's belief that his dissolution was or was not impending. While the fact that the deceased lived nearly three days after making the declaration naturally raises a doubt which would not have existed as to the certainty that the declaration was made under the shadow of impending dissolution, and it does not, under such circumstances, seem so certain as where death follows speedily thereafter, yet this should have little effect in determining the question as to the admissibility of the evidence. *People v. Chase*, 79 Hun 296, 29 N. Y. S. 376, *aff'd* 143 N. Y. 669, 39 N. E. 21. An interval of five months between the making of the declaration and the death of the declarant has been held not to defeat the admission of the declaration. *State v. Craine*, 120 N. C. 601, 27 S. E. 72. It is not, therefore, essential that the dying declaration should have been made while the declarant was drawing his last breath. In the language used by the Court in *People v. Chase*, *supra*:

"It is the condition of mind of the declarant which determines that question. If it appears that the declarant is conscious of impending death, and without expectation or



hope of recovery, even if the final event is postponed longer than had been anticipated, such postponement in no manner affects the condition of mind of the declarant at the time of making the declaration; nor is the situation of the declarant less solemn and awful, nor is every motive to falsify less completely silent."

### § 306. Consciousness of Impending Death.

The deceased, at the time of the declaration, must have been under a sense of approaching death, without any hope of recovery. If he has the slightest hope of recovery, his statements are inadmissible.

It is not enough to show that the declarant was in a dying condition, and that he nodded assent when told that he was. *People v. Perry*, 8 Abbott's Prac. (N. S.) 27. Thus, if the declarant, when making his statement, merely states that he "has no hope, at present," or says, "Who knows? Perhaps I may get well," or express a hope that "God would let him live," his statements negative the idea that all hope has been abandoned, and are, therefore, inadmissible as dying declarations. *People v. Brecht*, 120 App. Div. 769, 105 N. Y. S. 436, aff'd 192 N. Y. 581, 85 N. E. 1114. "Believing I am near death, and realizing that I may not recover, I wish to make this my dying statement as to the cause of my death, etc.," was held inadmissible, as slight hope of recovery is evidenced. *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30.

The following declarations, however, have been held sufficient proof of a sense of impending death: "I am sure to die"; "I am obliged to die"; "I cannot live and want to make a dying declaration"; "I have no hope of recovery"; "I am killed"; and "I believe I am going to die. I would like to live to show you what a good girl I could be, but I won't have the chance." *People v. Chase*, 79 Hun 296, 29 N. Y. S. 376, aff'd 143 N. Y. 669, 39 N. E. 21.

While declarations of the deceased, showing an abandonment of all hope and a consciousness of impending death are most satisfactory and convincing, yet they do not con-

stitute the only means of ascertaining one's belief as to approaching dissolution. A person's mental condition or belief, when relevant, may be shown by circumstances. *Territory v. Eagle*, 15 N. M. 609, 110 Pac. 862, fully annotated 30 L. R. A. (N. S.) 391. Thus, consciousness of impending death may be shown by the declarant in his sending for a priest or spiritual adviser in order that he may receive religious consolation and the last rites of his church preparatory to death. *Carver v. United States*, 164 U. S. 694, 41 Law. Ed. 602, 17 Sup. Ct. Rep. 28, *Richardson's Cases in Evidence*, p. 457; *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355. In *People v. Stacy*, 119 App. Div. 743, 104 N. Y. S. 615, aff'd 192 N. Y. 577, 85 N. E. 1114, the Court pointed out that, although the declarant's attending physician had held out some hope to her, the fact that she had disposed of her only child in expectation of her approaching death and had received the last rites of her church clearly indicated that she had no hope of recovery.

If the deceased, at the time of making the declaration, had abandoned all hope of recovery, a hope of recovery at a subsequent time would not render the declaration incompetent. *State v. Turlington*, 102 Mo. 642, 15 S. W. 141. See, also, *Ex parte Meyers*, 33 Tex. Crim. Rep. 204, 26 S. W. 196.

### § 307. Competency of Declarant as a Witness.

If the declarant would be incompetent as a witness if living, his dying declarations are inadmissible. Dying declarations are admitted on the ground that the belief in impending death is equivalent to the sanction of an oath, and the persons making them are considered in the light of witnesses and stand in the same situation as if they were sworn. Therefore, what will exclude the living witness will exclude his dying declaration. *Donnelly v. State*, 26 N. J. L. 463; *Chamberlayne's Modern Law of Ev.*, Vol. IV, sec. 2827.

### § 308. In What Class of Cases Admissible.

Declarations made *in extremis* are never admissible in

civil cases as dying declarations, though they may be received upon other grounds, as, for example, where the statement involves matter of pedigree, or where they form a part of the *res gestae*. Nor, with but one exception, are they ever received in criminal cases other than homicide, and then only "where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations." Greenleaf on Ev., 16th Ed., sec. 156; *Wilson v. Boerem*, 15 Johns. (N. Y.) 286; *Waldele v. New York C. & H. R. R. Co.*, 19 Hun 69; *Barfield v. Britt*, 47 N. C. 41, 62 Am. Dec. 190.

The one exception to the rule that dying declarations are applicable only to homicide cases has been created by statute. Code of Crim. Pro., sec. 398a, provides, that, in prosecutions for abortion, "the dying declarations of the woman whose death is produced by any of the means set forth in said article (Penal Law, secs. 80 to 82), shall be admitted in evidence subject to the same restrictions as in cases of homicide." This changes the common law rule laid down in *People v. Davis*, 56 N. Y. 95.

The death which is the subject of the charge must be the death of the declarant. Where, therefore, the accused is on trial for the murder of one person, it is not competent to admit dying declarations of another person who was killed in the same affray as the person for whose death the accused is on trial, as such declarations can only be received when coming from the deceased person for whose murder the prisoner is indicted. *State v. Fitzhugh*, 2 Or. 227. On the celebrated trial of Police Lieutenant Becker for the murder of Herman Rosenthal, counsel for the defendant offered to prove that "Dago Frank," one of the gunmen who shot Rosenthal for hire, immediately before his execution at Sing Sing, declared that, so far as he knew, Becker had nothing to do with the killing of Rosenthal. Although this statement was made by one of the principal perpetrators of the crime charged, just before going to the electric chair, at a moment when death was certain and he could have no hope of escape, the Court of Appeals held that it was inadmissible

as a dying declaration because of the well established rule that no statement can be received in evidence as a dying declaration unless it is shown to have been made by the victim of the homicide for which the accused is on trial. *People v. Becker*, 215 N. Y. 126, 109 N. E. 127, *Richardson's Cases in Evidence*, p. 470.

### § 309. Subject of Declarations.

Dying declarations are admissible only when the circumstances producing and attending the death are the subject of the declarations, and they may not properly include narratives of past occurrences. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814, *Richardson's Cases in Evidence*, p. 465; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *State v. Johnson*, 41 R. I. 253, 103 Atl. 741. In *People v. Smith*, *supra*, the Court of Appeals held that dying statements of the victim were improperly received in evidence because they were a mere narrative of what occurred three hours before the murder.

Dying declarations, like the testimony of living witnesses, must be confined strictly to statements of fact and may not include expressions of belief or suspicion. *People v. Shaw*, 63 N. Y. 36; *Jones v. State*, 79 Miss. 309, 30 So. 759. Nor may they include statements of the existence of enmity between the accused and the declarant; nor declarations as to previous threats made by the accused. *Hackett v. People*, 54 Barb. (N. Y.) 370. In brief, any part of a dying declaration, which is not confined strictly to the facts and circumstances of the homicide itself will be excluded.

### § 310. Form of Declarations.

The declaration of the deceased may be by words, by signs, or in writing. There are no formalities to be observed. *Commonwealth v. Casey*, 11 Cush. (Mass.) 417, 59 Am. Dec. 150. The statement may be made in answer to questions, and even leading questions are no objection to its admission. *Maine v. People*, 9 Hun 113. This is due to the fact that it is not necessary that the examination

of deceased be conducted after the manner of interrogating a witness. If the statement is reduced to writing, it may be verified or unverified.

The use of printed forms in obtaining ante-mortem statements has been disapproved by our courts. At the head of such printed forms the following questions invariably appear: "Do you now believe that you are about to die? Have you any hope of recovery from the effects of the injury that you have received?" It has been pointed out that a mere assent to these questions is not sufficient to establish with certainty the fact that the declarant had abandoned all hope of recovery. *People v. Sarzano*, 212 N. Y. 231, 106 N. E. 87, *Richardson's Cases in Evidence*, p. 491. In *People v. Kane*, 213 N. Y. 260, 277, 107 N. E. 655, the Court expressed itself as follows:

"This method of interrogation by reference to printed questions is not necessarily objectionable in itself provided the questions are put, not in a perfunctory manner, but in such a way as to impress the injured person with their true character and meaning. On the other hand, if the initial inquiry in reference to the patient's apprehension of death is slurred over and we have nothing but a careless assent, perhaps expressed only by a nod to the question, whether the patient now believes that he is about to die, there is an utter absence of the clear and unequivocal expression of the certain conviction of impending death which the law has always demanded as an essential prerequisite to the admission of unsworn declarations of fact which may be used to deprive a human being of his life."

### **§ 311. Best Evidence Rule Applied to Dying Declarations.**

There is some authority for the view that, the declarations made by the deceased being verbal, the fact that a witness wrote them down at the time gives the writing no higher dignity as evidence than the recollection of any witness who heard them, and the fact that the writing was signed and sworn to by the declarant makes no difference.



State v. Whitson, 111 N. C. 695, 16 S. E. 332; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200. The weight of authority, however, supports the rule that, where the dying declaration has been reduced to writing and the writing signed or affirmed by the declarant after its contents have been fully made known to him, the writing is the best or primary evidence and secondary evidence is inadmissible until the non-production of the writing has been satisfactorily accounted for. Adams v. State, 19 S. W. (Tex.) 907; 56 L. R. A. 423, note.

Upon the question of the admissibility of parol evidence to prove a dying declaration where it is shown that a written memorandum thereof has been lost or destroyed, some of the cases hold that parol evidence is admissible to prove the contents of the lost writing. State v. Clark, 142 La. 305, 76 So. 722, annotated 2 A. L. R. 1709; whereas others hold that it is not oral proof of the contents of the writing that is received, but proof of what the deceased said. This distinction seems identical in theory with the illustrations given in Greenleaf on Ev., 16th Ed., sec. 90.

### § 312. Admissibility Question for Court.

Whether a dying declaration was made under circumstances to entitle it to be admitted is a preliminary question for the court to determine. That is an issue with which the jury has no concern. People v. Smith, 104 N. Y. 491, 10 N. E. 873; People v. Kraft, 148 N. Y. 631, 43 N. E. 80; People v. Brecht, 120 App. Div. 769, 773, 105 N. Y. S. 436, aff'd 192 N. Y. 581, 85 N. E. 1114; People v. Becker, 215 N. Y. 126, 147, 109 N. E. 127, Richardson's Cases in Evidence, p. 470.

### § 313. Weight and Credibility of Declarations.

After the admission of a dying declaration, its weight and credibility are for the jury. State v. Valencia, 19 N. M. 113, 140 Pac. 1119, annotated 52 L. R. A. (N. S.) 152. "While dying declarations, when admitted in evidence, are entitled to be considered as having the weight of an oath, they are

not of the same value and weight as direct evidence of a witness, subject to cross-examination, and whose demeanor, when upon the stand, is open to the observation of the jury. An instruction, therefore, by the court that such a declaration should be given all the sanction of evidence which the law can give to evidence, constitutes reversible error." *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80. The Court's charge to the jury upon the subject of dying declarations, that "it is the experience of mankind that the premonitions of immediate death, from which there is no hope of recovery, are always sufficient to influence persons so situated to speak the truth," was held to be error, in *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024.

With the modern trend of thought away from the old-fashioned beliefs and superstitions concerning rewards and punishments after death, courts have shown an increasing tendency to regard dying declarations with caution. A good statement of the weight to be given to dying declarations as compared with the testimony of living witnesses is found in the opinion of the Court in *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355, *Richardson's Cases in Evidence*, p. 461.

"Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down. Such evidence is the mere statement of what was said by a person not under oath, usually made when the body is in pain, the mind agitated and the memory shaken by the certainty of impending death. A clear, full and exact statement of the facts cannot be expected under such circumstances, especially if the declaration is made in response to suggestive questions, or those calling for the answer of 'Yes' or 'No.'"

After citing instances where dying declarations have been proved to be absolutely false, the Court went on to say, at p. 500:

"It is well settled, however, that while such evidence should be received with great caution, dying declarations are competent in a criminal prosecution for homicide in so far as they state facts, but not opinions, relating to the circumstances of the crime and the perpetrator thereof, provided a sufficient foundation is first laid. This exception to the general rule excluding hearsay evidence is founded largely on what is regarded as a public necessity, and the rule yields to the exception in order to protect the innocent and punish the guilty. As the subject of the homicide cannot testify his unsworn statement of what happened to him is considered the best evidence obtainable, and hence, is admitted as legal evidence in order to prevent injustice, after all reasonable precautions have been taken to secure a truthful statement. Still the law does not regard such evidence, when admitted, as of the same value and weight as the testimony of a witness given in open court under the sanction of an oath and under the tests and safeguards which are there provided."

### § 314. Impeaching or Discrediting Dying Declarations.

The accused has the right to impeach the deceased declarant by any means which the law regards as legitimate to employ to impeach a living witness and discredit his testimony. 16 A. L. R. 411, note. For example, he may show that the reputation of the deceased for truth and veracity is bad, 16 A. L. R. 414, note; or that the deceased was unworthy of belief because he had been convicted of a crime, *Liddell v. State*, 18 Okla. Crim. Rep. 87, 193 Pac. 52, annotated 16 A. L. R. 405. It was held, in *Commonwealth v. Cooper*, 5 Allen (Mass.) 495, 81 Am. Dec. 762, that, "Dying declarations admitted to prove the identity of defendant as the person who committed a crime, may be rebutted by evidence showing that deceased had met and talked with persons with whom he was well acquainted, and had mistaken them at the time for other persons whom they did not resemble, and that he was in the habit of thus mistaking persons."

It has recently been held error to exclude evidence tending to show the deceased's mental condition, weakness, and uncertainty, at the time of making the dying declaration. *People v. Wilcox*, 245 N. Y. 404, 157 N. E. 509.

Since dying declarations are deemed equivalent to sworn statements, on the theory that a man, knowing he was about to die, would presumably be afraid to face his Maker with a lie upon his lips, the accused is entitled to show the disbelief of the deceased in God or in a future state of rewards and punishments, for the purpose of affecting the credibility of his dying declarations. *State v. Rozell*, 225 S. W. (Mo.) 931, annotated 16 A. L. R. 400.

The courts of the various states have differed widely on the question of whether or not dying declarations may be impeached or contradicted by evidence that the deceased declarant had made other inconsistent or contradictory statements at other times. 16 A. L. R. 417, note. Numerous authorities have held evidence of other contradictory statements of the deceased declarant inadmissible on the ground that no proper foundation can be laid by first calling them to the attention of the declarant and giving him a chance to explain or deny them. The leading case in support of this contention is *Wroe v. State*, 20 Ohio St. 460, which has been followed in a number of jurisdictions. The weight of authority, however, supports the view that, since dying declarations are admitted as exceptions to the rule against hearsay evidence on the ground of necessity, and since the accused has no opportunity of cross-examining the declarant, he should not be prevented from impeaching his dying declarations by a technical rule with which it is impossible to comply. In *Carver v. United States*, 164 U. S. 694, 41 Law. Ed. 602, 17 Sup. Ct. Rep. 228, *Richardson's Cases in Evidence*, p. 457, decided in 1897, the United States Supreme Court expressly declared the case of *Wroe v. State*, *supra*, to be contrary to the weight of authority. The question appears not to have been before the courts of New York since 1876, when the case of *Maine v. People*, 9 Hun 113, was decided on the authority of *Wroe v. State*, *supra*. Since



Maine v. People, *supra*, has never been overruled in this state, and since the question has never been carried to the Court of Appeals, the New York law on this point is still in an unsettled condition, although it seems probable that, if the question should again be raised in the higher courts of this state, the ruling in the federal case of Carver v. United States, *supra*, would be adopted as the better authority.

### § 315. Impeaching Witness Who Testifies to Declarations.

Obviously, any witness who takes the stand and repeats on oath what he heard the deceased declarant say, may be impeached like any other witness. See chapter on Examination of Witnesses. This living witness who testifies to the dying declaration may be shown to have a bad reputation for truth and veracity or to be unworthy of belief for other reasons, or his testimony may be contradicted. This is an entirely different thing from the impeachment of the deceased declarant. Under proper restrictions both are permissible. 16 A. L. R. 411, note.

Statements made by a witness when he testified before a grand jury as to a dying declaration, are admissible if they are inconsistent with the testimony now offered against the accused. People v. Wilcox, 245 N. Y. 404, 157 N. E. 509.

### § 316. Constitutionality.

The objection has frequently been raised that the rule admitting dying declarations is in violation of the constitutional right of the accused to be confronted with the witnesses against him in the presence of the court. The courts have been unanimous, however, in holding this objection untenable on the ground that the deceased declarant is not a witness within the meaning of such a provision. Brown v. Commonwealth, 73 Pa. 321, 13 Am. Rep. 740, Richardson's Cases in Evidence, p. 487. In People v. Corey, 157 N. Y. 332, 347, 51 N. E. 1024, the Court reasoned as follows:

"They (counsel for the defendant) now urge that dying



declarations, although competent at common law, are no longer competent, because the Code of Criminal Procedure, in prescribing the rights of a defendant in a criminal action, provides that he is entitled 'to be confronted with the witnesses against him in the presence of the court,' except in certain cases not now material. (Code Crim. Pro. sec. 8, sub. 3). We do not think the legislature intended to abolish the rule governing the admission of dying declarations, and such certainly has not been the understanding of the profession or the courts. We are not aware that this question has ever been raised before in this state, and yet the Criminal Code has been in force for nearly twenty years, and the Revised Statutes, which contain a similar provision, for nearly seventy years (1 R. S. 94, sec. 14). The right of the accused to be confronted with the witnesses against him has always been a part of the Bill of Rights, and yet dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any living witness against him. It is upon this ground that the objection to the introduction of such declarations in evidence against a defendant, based on his constitutional right to be confronted with the witness against him, has been uniformly overruled in those jurisdictions where such constitutional provisions are in force. It is invariably held that the deceased is not a witness within the meaning of such a provision or of the Bill of Rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the declaration."

Here follows citation of numerous authorities in foreign jurisdictions. See page 348 of the opinion.

## CHAPTER XV.

### DECLARATIONS AS TO REPUTATION CONCERNING MATTERS OF PUBLIC OR GENERAL INTEREST

#### § 321. General Rule.

Declarations of deceased residents concerning the general or common reputation in the community with respect to matters of public or general interest are admitted in evidence as an exception to the Hearsay Rule. *Inhabitants of Enfield v. Wood*, 212 Mass. 547, 99 N. E. 331. Matters of public or general interests are those matters concerning property rights and the like which affect the rights and liabilities of the people as a whole. "Public" interest means an interest which concerns all the people of the State. "General" interest signifies such matters as concern the people of a community or district. *Greenleaf on Ev.*, 16th Ed., sec. 128. The declarations must be of matters of current assertion and acquiesced in by the public. If the rights contended for have been the subject of disputes and contentions, they are lacking in the common reputation necessary to establish them. *The Queen v. Inhabitants of Bedfordshire*, 4 El. & Bl. 535, 119 Eng. Rep. 196. The cases illustrating this exception, while numerous in England, are few in the United States. Hearsay evidence has been admitted where the question involved related to a right of common; to the boundaries of towns, counties, hamlets, and parishes; to the public character of roads; to the location of a section line or street boundary; and to a prescriptive liability to repair sea-walls. For authoritative cases, see *Jones on Ev.*, sec. 301; 22 C. J., pp. 254-258.

#### 322. Reasons for Exception.

The reasons for this exception to the rule excluding hearsay evidence are: (1) the necessity of the case, owing to the fact that the declarant is dead and that the matters involved are of ancient and obscure origin; and (2) the strong

presumption that such declarations are true, due to the fact that, had they been false, conflicting interests of other persons would have resulted in contradictory statements.

### § 323. Requisites for Admissibility.

That hearsay declarations may be received under this exception to the general rule, it must appear

1. That the declarant is dead,
2. That the declarant had sufficient opportunity to acquire knowledge of the fact in issue,
3. That the declaration was made *ante litem motam*,
4. That the declaration related to matters of general reputation and not individual assertion,
5. That the declaration concerned matters of public or general interest.

### § 324. Death of Declarant.

The death of the declarant must be shown. It seems that his unavailability, owing to insanity or his absence from the jurisdiction, is sufficient. Wigmore on Ev., sec. 1565; O'Connell v. Cox, 179 Mass. 250, 60 N. E. 580.

### § 325. Knowledge of Declarant.

The declarations of any deceased citizen relating to matters of public interest are admissible. Proof of actual knowledge is not necessary, because all citizens are presumed to have knowledge of public matters or rights. But in declarations relating to matters of general interest or those rights which are common to a community only, no such presumption of knowledge exists, and proof that the declarant was conversant with such interests is essential. Greenleaf on Ev., 16th Ed., sec. 128a.

In McKinnon v. Bliss, 21 N. Y. 206, Richardson's Cases in Evidence, p. 499, an attempt was made to prove by reputation that the patentee under a royal grant of a large tract of land, consisting of several townships, had burned his muniments of title. The Court ruled that, while this might be deemed a matter of general interest in the community,

the evidence was incompetent, because no proof had been made that the settlers upon the tract in question claimed title under the grant referred to, and that, consequently, it did not appear that they had any interest in or knowledge on the subject.

### § 326. Declarations Made Ante Litem Motam.

Declarations relating to matters of public or general interest, as well as declarations relating to matters of pedigree, must be made *ante litem motam*. The *lis mota*, in this connection, means the origin of the controversy, and not necessarily the commencement of the suit. The reason for this requirement is that declarations made *post litem motam* are apt to be induced by interest or prejudice, and, therefore, biased or untrue. Greenleaf on Ev., 16th Ed., sec. 131; Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543; 22 C. J., p. 257.

### § 327. Reputation, Not Individual Assertion.

The declarations must relate to community reputation, and not merely individual opinion. Wigmore on Ev., sec. 1584. Thus, in Queen v. Bliss, 7 A. & E. 550, 112 Eng. Rep. 577, testimony was offered that one R, now deceased, had planted a willow tree in a certain spot to indicate the location of the boundary of the highway. In rejecting it, the Court said: "He does not assert that he heard old people say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point. It is a mere allegation of a fact by an individual. That is, he knew it to be so from what he himself observed, and not from reputation."

### § 328. Public and Private Boundaries.

All courts agree that public boundaries may be established by reputation-evidence. But, as to establishing private boundaries by such evidence, there is much conflict of authority. In the United States it is generally held that reputation-evidence of the land-marks of private boundaries

of land is admissible. "That hearsay or reputation is admissible as evidence . . . upon questions respecting the boundaries of lands, is a familiar doctrine." *McKinnon v. Bliss*, 21 N. Y. 206, 217, *Richardson's Cases in Evidence*, p. 499; *Clement v. Packer*, 125 U. S. 309, 31 Law. Ed. 721, 8 Sup. Ct. Rep. 907, *Richardson's Cases in Evidence*, p. 506; *Partridge v. Russell*, 2 N. Y. S. 529; 22 C. J., p. 255. Thus, statements of a deceased person, as to the boundary of his land, though not made upon the land, are admissible where the declarant had means of knowledge as to such boundary, and where there is no apparent interest to misrepresent. *Jackson v. McCall*, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343. The declarations must, however, be confined to reputation of boundaries and may not be used to prove title. *Wigmore on Ev.*, sec. 1587.

### § 329. Form of Declarations.

The declarations may be oral or in writing. They may be contained in deeds, leases, judgments or decrees of court, general historical treatises, or in ancient maps, plans, surveys, and the like. *Greenleaf on Ev.*, 16th Ed., sec. 139; 22 C. J., p. 258.



## CHAPTER XVI.

### THE RES GESTAE DOCTRINE AND SIMILAR EXCEPTIONS TO THE HEARSAY RULE

*Res Gestae* Doctrine; Declarations of Testator; Declarations of Pain and Suffering; Declarations of Intention; Declarations of Reason, Motive and Feeling; Declarations of Complainant in Rape Cases; Commercial Reports to Prove Market Value; Statistical Tables.

#### § 330. The *Res Gestae* Doctrine.

The *res gestae* is the transaction or thing done. Declarations or statements which accompany an act and which tend to elucidate and explain the character and quality of the act are admitted in evidence as part of the *res gestae*. The doctrine is well stated in the leading Massachusetts case of *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36.

“When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay.”

Upon this theory the declarations of a man who had been run over by a train, as to the cause of the accident, were rejected in *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41, *Richardson's Cases in Evidence*, p. 512. In that case a deaf mute was found lying in a mangled condition on the railroad track soon after the passage of a train. About thirty minutes later his brother arrived and obtained from him, by signs, a statement of how the accident occurred. As the declarant was a deaf mute, this

was his first opportunity to make himself understood. The Court of Appeals pointed out that, however worthy of belief such statements might be, nevertheless, they were so far separated from the act which they are alleged to characterize that they could not be said to receive any credit from it or from the surrounding circumstances, and so were no better than any unsworn statements made under any other circumstances, since they depended entirely upon the veracity of the declarant.

Many cases go further, however, and admit statements as part of the *res gestae* which were made after the act of transaction was completed. In these cases the test is whether the declarations are shown to have been uttered spontaneously so that the declarant obviously had no time or opportunity for fabricating a story. Professor Wigmore points out that these two classes of declarations are not identical and should not be admitted under the same exception to the Hearsay Rule. The first class of declarations, which are strictly a part of the *res gestae*, he characterizes as "verbal acts." Wigmore on Ev., Chap. LVIII. The second class, declarations which were uttered after the completion of the act or event but so close to it in point of time and under such circumstances as to preclude the possibility of fabrication, he calls "spontaneous exclamations." Wigmore on Ev., Chap. LVII. This distinction goes far to clarify a difficult subject and has, in fact, been adopted by the courts in some instances. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690, *Richardson's Cases in Evidence*, p. 448. Most of the cases, however, recognize no such distinction, and therefore the rule must be stated broadly to include both classes of declarations, as follows: Declarations are admitted in evidence under the *res gestae* rule when they were uttered at the time of the event in issue and as a part of the act or happening which they characterize, or so close to it in point of time and under such circumstances as to preclude the possibility of fabricating a story. *Hill v. Commonwealth*, 2 Grat. (Va.) 594; *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 Law. Ed. 437; *People*

v. Curtis, 225 N. Y. 519, 122 N. E. 623, 37 N. Y. Crim. Rep. 404.

"The test is, were the declarations the facts talking through the party, or the party's talk about the facts. Instinctiveness is the requisite, and when it is obtained the declarations are admissible. Nor are there any limits of time within which the *res gestae* can be arbitrarily confined. They vary in length in each particular case." Wharton on Cr. Ev., 8th Ed., secs. 691 and 262, quoted with approval in State v. Hudspeth, 159 Mo. 178, 60 S. W. 136. Thus, in Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20, it was held that a declaration by a person receiving a personal injury, resulting in unconsciousness and continuing for eight days, made immediately upon regaining consciousness and before any opportunity for reflection as to the cause of the accident, is admissible. But the declaration must be spontaneous and not a mere narrative of a past occurrence. Barker v. St. Louis, I. M. & S. Ry. Co., 126 Mo. 143, 28 S. W. 866; Eastman v. Boston & M. R. R., 165 Mass. 342, 43 N. E. 115; Waldele v. N. Y. C. & H. R. R. Co., *supra*. See authorities collated and discussed in 42 L. R. A. 918, note. The strictness with which the New York courts insist on this distinction is well illustrated in Greener v. General Electric Co., 209 N. Y. 135, 102 N. E. 527, Richardson's Cases in Evidence, p. 520. In that case a workman stepped upon a ladder, which bent under his weight and threw him to the ground, causing injuries which resulted in his death. A fellow workman testified that when he saw him fall he ran to him where he lay and asked him what had happened, to which he replied: "My feet is broke; the ladder bent over." In holding this declaration inadmissible under the *res gestae* rule, the Court said, at p. 138:

"The distinction to be made is in the character of the declaration; whether it be so spontaneous, or natural, an utterance as to exclude the idea of fabrication; or whether it be in the nature of a narrative of what has occurred. In the present case, the declaration of the deceased was not spontaneous; it was called forth by the inquiry as to 'what

had happened' and was, distinctly, narrative." It seems impossible to distinguish the facts of this case from those in the earlier case of *People v. Del Vermo*, *supra*, in which the Court of Appeals held a similar declaration admissible as a spontaneous exclamation. In the *Del Vermo* case a witness testified that he had been walking with the deceased and the accused when the latter suddenly started to run and the deceased walked forward a few steps and fell to the sidewalk. The witness asked: "What is the matter?" and received the reply: "Del Vermo stabbed me with a knife." In both cases the exclamation followed the injury almost instantly. In the *Greener* case the court appeared to base its decision upon the fact that the statement was made in response to an inquiry as to what had happened, and yet the declaration in the *Del Vermo* case was made in answer to an exactly similar inquiry. The ruling in *Greener v. General Electric Co.*, *supra*, has been followed in later decisions. *People v. Sprague*, 217 N. Y. 373, 111 N. E. 1077; *People v. Chapman*, 191 App. Div. 660, 181 N. Y. S. 750; *Columbia Law Review*, April, 1928.

### § 331. Declarations of an Agent or Servant.

Although the courts are most strict in applying the rule that admissions of an agent or servant, not shown to have been made within the scope of his authority, will not be received in evidence against his principal, nevertheless, declarations of an agent or servant are admissible if they are clearly shown to constitute a part of the *res gestae*. Once a declaration is brought clearly within the *res gestae* rule, it is always admissible, irrespective of whether the declarant happened to be a principal or an agent. *N. J. Steamboat Co. v. Brockett*, 121 U. S. 637, 30 Law. Ed. 1020, 7 Sup. Ct. Rep. 1039, *Richardson's Cases in Evidence*, p. 541; Editorial, *New York Law Journal*, October 28, 1925. The application of the *res gestae* rule to the declarations of an agent or servant is well stated in the opinion of the Court in *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131, *Richardson's Cases in Evidence*, p. 546.



"The declarations of an agent or servant do not in general bind the principal. Where his acts will bind, his statements and admissions respecting the subject matter of those acts will also bind the principal, if made at the same time and so that they constitute a part of the *res gestae*. To be admissible, they must be in the nature of original and not of hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time."

### § 332. Competency of Declarant as Witness.

Declarations which are a part of the *res gestae* are not excluded by reason of the incompetency as a witness of the person making them because "such exclamations are not admitted on the ground of the legal competency of the person making them, but because they are a part or reflection of the transaction. By the same token the growl of a dog or the neighing of a horse is also competent as *res gestae*." *State v. Lasecki*, 90 Ohio St. 10, 106 N. E. 660, annotated L. R. A. 1915E 202. In that case, the exclamation of a child of four that "the bums killed Pa with a broomstick," made a few seconds after the fatal assault, was held admissible as the spontaneous and impulsive language of the situation.

### § 333. Declarations of Testator.

The confusion which exists as to the admissibility of the declarations of a testator relating to the validity of his will arises from a failure to properly classify the purposes for which such declarations are offered. These may be classified as follows:

1. To show the revocation of a will, admitted to have been once valid. The only declarations of a testator that are admissible for the purpose of showing a revocation of his will are those that accompany the act by which the will is destroyed or invalidated. Mere words will, in no case, amount to a revocation. They must be a part of the *res*



*gestae*. They are then admitted for the purpose of showing the intent of the act. *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, *Richardson's Cases in Evidence*, p. 525; *Eighmy v. People*, 79 N. Y. 546.

2. To prove the existence and contents of a lost will. The Surrogate Court Act, sec. 143, provides that:

"A lost or destroyed will can be admitted to probate in a surrogate's court, but only in case the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness." Since the statute expressly provides for the only method by which the contents of a lost will may be proved in order to entitle it to be admitted to probate, viz., by two witnesses or one witness and a correct copy, it is clear that declarations of the testator are never admissible for the purpose of proving the contents of a lost or destroyed will. Thus, it was held in *Matter of Kent*, 169 App. Div. 388, 155 N. Y. S. 894, that declarations of the testatrix were inadmissible to prove the contents of two missing clauses of her will. The Court of Appeals has held that declarations of the testator are also inadmissible to prove non-revocation during his life and thus to establish the existence of the will at the time of his death. *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442, *Richardson's Cases in Evidence*, p. 533. The Court pointed out in that case that there cannot be any distinction in principle between declarations of a deceased person to prove an act of revocation and like declarations of a deceased person to disprove the same act. The danger of substituting oral for written proof of testamentary disposition of property is as great in one case as in the other.

3. To impeach the validity of a will on account of duress, fraud, or mistake. Where the object is to impeach the validity of a will on account of fraud, duress, mistake, or some cause other than mental weakness, only such declarations of the testator as were made at the time of the execution of the

will and which are a part of the *res gestae* are admissible. *Waterman v. Whitney, supra.*

4. To show mental incapacity or undue influence. Where the validity of the will is attacked on the ground of mental incapacity or undue influence, the declarations of the testator, made before, at, or after the time of the execution of the will, are admissible for the sole purpose of evidencing the mental state of the testator at the time when the will was executed. Thus, declarations of the testator, made either before or after the execution of a will, as to his testamentary intentions, are competent on the question of his testamentary capacity. *Holliday v. Shepard*, 269 Ill. 429, 109 N. E. 976, 7 A. L. R. 558. Whether the declarations are too remote in point of time to have a legitimate bearing on this question is for the court to determine. *Waterman v. Whitney, supra*; *Smith v. Keller*, 205 N. Y. 39, 49, 98 N. E. 214. Upon the question of undue influence, declarations of the testator are admissible not to prove external facts but as evidence of the strength or weakness of the testator's mind at the time when the will was executed, as bearing upon the question of the amount of influence required to coerce that mind into the performance of an involuntary testamentary act. *Matter of Woodward*, 167 N. Y. 28, 60 N. E. 233.

The general principle underlying all of these rules governing the admissibility of hearsay declarations of a testator is clear. The settled policy of the law requires that all testamentary dispositions of property be in writing, with a single statutory exception providing for nuncupative wills (Dec. Est. Law, sec. 16) and that the due execution or revocation of the same be proved with all of the formalities required by statute. Dec. Est. Law, secs. 21 and 34; Surrogate Court Act, sec. 141. It follows, therefore, that no will can be established or disproved by means of hearsay declarations of the testator with respect to his testamentary acts or intentions. To admit such evidence would be to defeat the "safe and wholesome policy, always favored in this state by the courts and the legislature, of substituting in

every possible case written for oral proof of testamentary intentions." Matter of Kennedy, *supra*. There are only two classes of declarations of a testator which are admissible for any purpose; viz., declarations which are a part of the *res gestae* and declarations which are offered for the purpose of evidencing the testator's mental condition at the time when the will was executed. In the first class—declarations which are a part of the *res gestae*—are included declarations which accompany an act of revocation and which are offered to establish the *animo revocandi* or, in other words, to show the intent with which the act relied upon as a revocation was done, and declarations made at the time of executing the will which are offered to prove that the will was executed as a result of fraud, mistake, or duress. In the second class—declarations to show the testator's mental condition at the time of executing the will—are included any and all declarations on any subject whatever, provided they are not too remote in point of time to have some legitimate bearing on the question of the declarant's testamentary capacity at the time when the will was executed. But such declarations are never admissible except in cases where the testamentary capacity of the declarant is in issue or where the will is contested on the ground of undue influence. *Throckmorton v. Holt*, 180 U. S. 552, 45 Law. Ed. 663, 21 Sup. Ct. Rep. 474. See case last cited for an able review of the conflicting authorities on the admissibility of declarations of a testator in will cases.

The rules governing the admissibility of declarations of a testator in will cases apply with equal force to the declarations of a grantor as bearing on the validity of his deed. *Sanford v. Ellithorp*, 95 N. Y. 48.

### § 334. Declarations of Pain and Suffering.

In all common law jurisdictions, a person's manifestations and declarations of present pain and suffering have long been admitted in evidence for the purpose of showing that person's physical condition at the time. *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 Law. Ed. 437.

This rule has been somewhat restricted, however, by the New York Court of Appeals. Early New York cases followed the general rule admitting testimony of a person's declarations of pain and suffering by any witness who heard them. *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346. Later the Court of Appeals pointed out that the evidence was admitted in these early cases upon the ground of necessity, because parties to an action were not allowed to be witnesses, and that, since the amendment to the Code in 1869 (now found in Civil Practice Act, sec. 346), permitting a party to an action to testify in his own behalf, "the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease." *Roche v. Brooklyn City & Newtown R. R. Co.*, 105 N. Y. 294, 11 N. E. 630, *Richardson's Cases in Evidence*, p. 522. In that case a lay witness offered to testify that the plaintiff, some days after the happening of the accident which caused her injury, complained that she was suffering pain in her arm. The Court drew a sharp distinction between groans, screams, or other manifestations of a seemingly involuntary nature, indicative of bodily suffering, and simple statements of a person that he was then suffering pain. The former are always admissible. *Hagenlocher v. The C. I. & B. R. R. Co.*, 99 N. Y. 136, 1 N. E. 536. The latter, except when made to a physician for the purpose of obtaining treatment, are now excluded in this state, unless made at the time of the injury so as to constitute a part of the *res gestae*. *Roche v. Brooklyn City & Newtown R. R. Co.*, *supra*; *Kennedy v. Rochester City & Brighton R. R. Co.*, 130 N. Y. 654, 29 N. E. 141. There is a dictum in the *Roche* case to the effect that even the declarant's decease does not render his statements of pain and suffering admissible upon the necessity principle. This question was directly in issue, however, in *Tromblee v. North Am. Accident Ins. Co.*, 173 App. Div. 174, 158 N. Y. S. 1014, *aff'd* 266 N. Y. 615, 123 N. E. 892, and the Court ruled otherwise. In that case the plaintiff sought to prove that her husband died as a result of injuries sustained in



falling from a hack. The plaintiff's daughter testified that when she saw her father on the morning after the accident he complained of pain in the small of his neck. In reviewing the authorities in this State, the Court pointed out that, prior to the time when a party could be sworn in his own behalf, his declarations of pain and suffering were admitted upon the ground of necessity, as otherwise there was no way of proving pain, but when the party could be sworn there was no necessity and the evidence was excluded, and held that since the plaintiff, by reason of her husband's death, was unable to prove that he was suffering pain, or where the pain was located, otherwise than by his declarations, his simple declarations of pain and suffering were admissible on the ground of necessity, within the rule laid down in the cases cited. The New York rule, as it stands today, may be summarized, therefore, as follows:

1. Involuntary expressions of pain, such as screams, groans, moans, etc., are always admissible.

2. Declarations of pain and suffering are inadmissible, except

- a. When made to a physician for the purpose of obtaining treatment;

- b. When made at the time of the injury so as to constitute a part of the *res gestae*;

- c. When the declarant is dead.

A few other jurisdictions have followed the New York limitation. *West Chicago St. Ry. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996; *Wigmore on Ev.*, sec. 1719. The weight of authority, however, still favors the old common law rule admitting all manifestations and declarations of present pain and suffering, whether made to a physician or to any other witness. *Cashin v. N. Y., N. H. & H. R. R. Co.*, 185 Mass. 543, 70 N. E. 930; *Wigmore on Ev.*, sec. 1719. Professor Wigmore, commenting on the New York rule, says:

"The dictinction by which screams and other inarticulate exclamations are always admissible is utterly pedantic and impracticable. Moreover the preference for them as comparatively not liable to simulation is plainly fallacious; for



a little reflection shows that, if a person is determined to falsify, it is as natural and as feasible for him to lie with screams, groans and cries, as with articulate assertions of pain. The truth seems to be that the New York limitation is inconsistent alike with precedent, with principle, with good sense, and with itself. Unfortunately, however, its place as a local anomaly has not always been perceived, and courts in several other jurisdictions have accepted the physician-limitations of the modern New York cases as if they represented the orthodox rule." Wigmore on Ev., sec. 1719.

Narrative statements as to the cause of an illness or injury, as well as statements of past sufferings, even though made to a physician, are inadmissible. 22 C. J., p. 268; Boston & A. R. R. Co. v. O'Reilly, 158 U. S. 334, 39 Law. Ed. 1006, 15 Sup. Ct. Rep. 830. But where a statement to a physician, although narrative in character, relates to a matter which it is necessary for him to know in order that he may properly diagnose and treat the case, it will be received in evidence. 22 C. J., p. 268.

The declarations need not be made *ante litem motam*. To enforce this limitation, as it appears in some of the exceptions to the Hearsay Rule, would be to practically exclude this class of evidence. The fact that the statements were made during the pendency of an action may affect the credibility of the evidence, but this does not render the declarations inadmissible, except where it appears that the statements were made for the purpose of manufacturing testimony. Matteson v. N. Y. C. R. R. Co., 35 N. Y. 487; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573, Richardson's Cases in Evidence, p. 563.

### § 335. Declarations of Intention.

Oral or written declarations of an intention to do or not to do a certain thing are admissible whenever the declarant's intention is a material fact to be proved. Thus, upon the issue of whether a person did or did not commit suicide, the probability of suicide would be stronger if it could be

shown that the deceased had intended to commit suicide, and for this purpose his declarations of such an intention, if not too remote in point of time, may be testified to by any witness who heard them. *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961; *Hale v. Life Indemnity & Investment Co.*, 65 Minn. 548, 68 N. W. 182. In *State v. Ilgenfritz*, 263 Mo. 615, 173 S. W. 1041, the Court said:

"Suicidal threats are verbal acts, not narrative in character and therefore not hearsay, but are the direct result of the action of the mind having the suicidal intent or design, and, in cases like the present, should be admitted as original evidence of the condition of the mind from which they spring." No definite rule can be laid down as to when such declarations will be deemed too remote in point of time. Statements showing an intent to commit suicide, made by the deceased three years prior to his death, were held admissible, in *People v. Conklin*, 175 N. Y. 333, 343, 67 N. E. 624. The question of remoteness is largely in the sound discretion of the trial court, whose ruling on that question will not ordinarily be disturbed on appeal unless the discretion has been clearly abused. *State v. Kelly*, 77 Conn. 266, 58 Atl. 705. Declarations of intention to commit suicide are rejected in Illinois. *Greenacre v. Filby et al.*, 276 Ill. 294, 114 N. E. 536.

Upon the question whether a person left a certain place with a certain other person, letters written and mailed by him at that place to his family, and stating his intention to leave it with that person, are competent evidence of such intention. The reason for the admissibility of this kind of testimony is stated, in *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285, 295, 36 Law. Ed. 706, 12 Sup. Ct. Rep. 909, *Richardson's Cases in Evidence*, p. 547, as follows:

"The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still

alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

Upon the question of domicile, declarations of the person whose domicile is disputed are one mode of proving intention and are always admissible for this purpose. *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950; *Matter of Martin*, 94 Misc. 81, 157 N. Y. S. 474.

### § 336. Declarations of Reason, Motive, and Feeling.

Declarations showing a reason, motive, or feeling are admitted upon the same theory as declarations evidencing a design, plan, or intent. *Hadley v. Carter*, 8 N. H. 40. Thus, declarations, oral or by letter, of a bankrupt, on going from and returning home, as to his reasons for going abroad, are admissible for the purpose of showing that his motive was with intent to defraud his creditors. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 Law. Ed. 706, 12 Sup. Ct. Rep. 909, *Richardson's Cases in Evidence*, p. 547. So, too, in an action for the alienation of a wife's affections, and in other actions where a state of feeling is relevant, the conversations and correspondence of the parties with each other or with third persons is competent to show the state of affection existing between the parties. *Greenleaf on Ev.*, 16th Ed., sec. 162d; *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341. Also a tenant's statement of the reason for his refusal to retain the premises at the same rental, communicated to the landlord at the time when a reduction of the rental was made, has been held admissible. *Hine v. N. Y. El. R. R. Co.*, 149 N. Y. 154, 43 N. E. 414, *Richardson's Cases in Evidence*, p. 555. In that case, the Court of Appeals said, at p. 162: "The fact that the plaintiff was obliged to reduce rents after the construction of the railway in order to retain his tenants was competent. The refusal of the tenant to remain unless the reduction was made and his reasons for such refusal, all communicated to the landlord when the

actual reduction was made, characterized the act and was really a part of it. The ruling of the court was within the general principle, that when an act or transaction is itself admissible, statements or declarations of the party at the time, calculated to explain and elucidate the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible as part of the *res gestae*."

### § 337. Declarations of Complainant in Rape Cases.

Where on the trial of an indictment for rape, the injured female is examined as a witness, the fact that she made complaint of the injury promptly, or at the first suitable opportunity after the commission of the crime, may be testified to either by the prosecutrix herself or by any witness who heard her make such complaint. But the testimony must be confined to the bare fact that the victim of the crime made such timely complaint and may not contain any of the particular facts which she stated. *Baccio v. People*, 41 N. Y. 265, *Richardson's Cases in Evidence*, p. 559. This evidence is admitted for the sole purpose of corroborating the testimony of the complaining witness and is never received as independent proof of the commission of the crime. It follows that such evidence is excluded in all cases in which the victim of the crime does not testify at the trial, and this is generally held to be the rule even in cases where she is dead or incompetent to testify. *Elmer v. State*, 20 Ariz. 170, 178 Pac. 28, annotated 2 A. L. R. 1519; *People v. McGee*, 1 Denio (N. Y.) 19.

The disclosure of the crime will not be received in evidence in corroboration of the testimony of the complaining witness unless it appears to have been made within a very short time after the commission of the outrage or at the first suitable opportunity. *Commonwealth v. Cleary*, 172 Mass. 175, 51 N. E. 746. "But there may be circumstances which will excuse delay, as when the prosecutrix is under physical control of the defendant, when she is among strangers and there is no one in whom she can confide, when she is induced



to silence by threats, and is so far within the power or reach of the defendant that the threats may be executed. In such and other like cases delay may be excused, and the disclosure may be proved, and all the facts submitted to the jury for them to determine what weight shall be given to the disclosure, and what effect the delay shall have." *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880. In the recent case of *People v. Deitsch*, 237 N. Y. 300, 142 N. E. 670, the Court admitted testimony that the child, immediately after the assault, made complaint to a neighbor. However, statements to a policeman, half an hour later in reply to questions as to the crime, were held inadmissible.

### § 338. Commercial Reports to Prove Market Value.

Expert testimony concerning the market value of an article is original and not hearsay evidence. A witness who testifies concerning market value speaks of his own knowledge based upon facts of sales, offers, or quotations, even though his information may be largely derived from commercial reports and advices from others in the trade. *Watts v. Phillips-Jones Corporation*, 211 App. Div. 523, 207 N. Y. S. 493.

"Value, in a business sense, consists largely of the opinions of persons familiar with the market, and these opinions are largely made up by what is said and reported. Hence, if a person shows that his business is such that, by commercial reports or other means of like nature, he is familiar with the current market prices of an article he is competent to testify on the subject, although he may not have actual personal knowledge of any particular sales." *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476. Cases are collated in Editorial, *New York Law Journal*, April 22, 1925.

Upon the question of the value of certain teakettles, the opinion of an alleged expert that they were worth \$500 was held inadmissible, because it was shown that her opinion rested, not upon her own knowledge of the value of antiques, but upon a hearsay statement that some person connected



with Tiffany's thought the cost of replacing them was around \$500. *Palmer v. Everton*, 180 N. Y. S. 730.

Market value has been defined to be, "The price at which the owner of the goods, or the producer, holds them for sale; the price at which they are fully offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when goods are bought and sold in the ordinary course of trade." *Cliquot's Champagne*, 3 Wall. (U. S.) 114, 125, 18 Law. Ed. 116; *Muser v. Magone*, 155 U. S. 240, 249, 39 Law. Ed. 135, 15 Sup. Ct. Rep. 77. Merely private offers are inadmissible. There must be the element of publicity to give them the proper tests of "market value."

In excluding testimony showing that the defendant received certain offers for a piece of real property, the Court of Appeals said, in *Hine v. Manhattan Ry. Co.*, 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591:

"It must be borne in mind that we are not considering the admissibility of an offer made in an open market, such as the Produce Exchange, for an article of recognized uniform character, constantly bought and sold in the market, and having a place in the daily reports of prices current, such as number one wheat, or corn; but that of an unaccepted offer for a piece of real estate, having a market value it is true, but one not generally known in the market or to the public. Such market value may be shown by the testimony of competent witnesses but not by an offer."

But accurate commercial reports and lists showing bid and asked prices and actual sales on a given day, although hearsay, are admissible in evidence.

"It is unquestioned that in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence." *Virginia v. West Virginia*, 238 U. S. 202, 212, 59 Law. Ed. 1272, 35 Sup. Ct. Rep. 795.

A price-current list contained in a newspaper will not, however, be admitted in evidence without some preliminary

proof as to how the list was made up. *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202. In that case the Court said, per *Miller, J.*, at p. 474:

"The court was also in error, I think, in admitting the Shipping and Price-Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little, if any, weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out."

### § 339. Statistical Tables.

Standard tables of mortality, such as the Northampton tables, used in computing life insurance, dower, damages for the loss of life, and the cash value of annuities, although hearsay, are admissible in evidence because they are founded on certain and constant data and deal with exact science. *Schell v. Plumb*, 55 N. Y. 592; *Sauter v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 128, 34 Am. Rep. 522. As stated by the Court in *Hartley v. Eagle Ins. Co.*, 222 N. Y. 178, 186, 118 N. E. 622: "The tables of mortality are at best only slight evidence of the expectancy of life of any particular person to be considered in connection with proof of his health, constitution, habits and mode of living."

In *Garwood v. N. Y. C. & H. R. R. R. Co.*, 45 Hun 128, *Leffel's Millwrights' Tables* were admitted showing the number of horse power developed by a turbine wheel from a specified quantity of water.

"The American Lloyds," "The Green Book," and "The Record Book" are admissible to show the age, capacity, condition, and value of ships. *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802.

The Civil Practice Act, sec. 375, provides for the admissibility in evidence of state and federal weather bureau reports.

But books of inductive science, such as standard medical works, as well as learned treatises on art, are inadmissible. *Foggett v. Fischer*, 23 App. Div. 207, 48 N. Y. S. 741. In reversing a judgment for error in permitting counsel for the plaintiff to read to an expert witness, in the presence of the jury, an extract from a standard medical work, the Appellate Division said, in *Pahl v. Troy City Ry. Co.*, 81 App. Div. 308, 310, 81 N. Y. S. 46:

"The plaintiff was thus enabled to bring to the knowledge of the jury the statement, not under oath, of Dr. Charles L. Dana, whose writings on the subject of nervous diseases the witness testified were considered authoritative by the medical profession, and without the defendant having an opportunity to cross-examine Dr. Dana as to the facts and symptoms upon which he based his opinion, and as to whether, perchance, his views had undergone a change since the time the article was written."

#### HEARSAY IN WORKMEN'S COMPENSATION AND ARBITRATION CASES

##### § 339a. Application of Technical Rules of Evidence Unnecessary.

The investigation under the Workmen's Compensation Law need not follow the common law or statutory rules of evidence, but such investigation shall be made to ascertain the substantial rights of the parties. The statute also pro-

vides that declarations of a deceased employee, concerning an accident, shall be received in evidence and shall, if corroborated by circumstances or other evidence, be sufficient to establish the accident and the injury. Workmen's Compensation Law, sec. 118; *McQueeney v. Sutphen & Meyer*, 167 App. Div. 528, 153 N. Y. S. 554.

**§ 339b. Kind of Evidence Necessary to Sustain an Award.**

"The act may be taken to mean that while the commissions' inquiry is not limited by the common or statutory rules of evidence or by technical or formal rules of procedure, and it may in its discretion accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made." While the rule does not require the highest degree of evidence, yet there must be some evidence of a probative character to uphold the award. An award based wholly on hearsay will not be sustained. *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, *Richardson's Cases in Evidence*, p. 495; *Matter of Belcher v. Carthage Machine Co.*, 224 N. Y. 326, 120 N. E. 735.

**§ 339c. Evidence Proper in Arbitration Cases.**

Arbitrators, unless restricted by the submission, may disregard strict rules of evidence. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392; *Wheat Export Co. v. New Century Co.*, 185 App. Div. 723, 173 N. Y. S. 679. While, in the discretion of the arbitrator, hearsay evidence is admissible, nevertheless, it is misconduct for which the award may be set aside for the arbitrator after the hearing is closed to proceed, without further notice, to make an investigation. Refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think he has sufficient evidence without them. If the party who offers the witnesses is asked to state what he proposes to prove by them, and the arbitrators reject the witnesses on the ground of immateriality of their evidence, in order to set aside the

award, it would be necessary to show that the evidence offered was competent and material. *Halstead v. Seeman*, 82 N. Y. 27; *Stefano Berizzi Co., Inc. v. Bela Krausz*, 239 N. Y. 315, 146 N. E. 436.

Where it appears that the parties waived a hearing before the arbitrator and intended that he should be guided by personal knowledge and inspection, failure to hear evidence is no ground for setting aside the award. *Wiberly v. Matthews*, 91 N. Y. 648.



## CHAPTER XVII.

### ADMISSION OF FORMER TESTIMONY

#### § 340. Testimony at Former Trial.

Testimony given by a witness at a former trial is admissible in any subsequent action or proceeding where it appears that the witness has since died or become incompetent to testify, and that the parties and questions in issue are substantially the same. Civil Practice Act, sec. 348. This section is largely declaratory of the common law rule. The testimony, having been tested by oath and cross-examination at the former trial, satisfies the requirements of the Hearsay Rule. *Bradley v. Mirick*, 91 N. Y. 293.

#### § 341. Death or Incompetency of Witness.

To admit the testimony of a witness given at a former trial, it must be shown that, since the former testimony was given, the witness

1. Has died,
2. Has become insane,
3. Being a non-resident, has departed from the state,
4. Being a resident, has departed from the state by reason of military or naval service under the State or United States, or
5. Has become incompetent to testify by reason of Civil Practice Act, sec. 347.

At common law it was necessary to show that the witness was dead. Absence from the state was not sufficient, because an absent witness might be found and examined by commission. *Wilbur v. Selden*, 6 Cow. (N. Y.) 162; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110. Since the Legislature has extended the privilege to include testimony of non-resident witnesses who are absent from the state at the time of the second trial, the courts are most strict in requiring satisfactory proof of such non-residence and absence, as well as some evidence showing efforts to

procure the attendance of the witness. *New York County Nat. Bank v. Hermann*, 173 App. Div. 814, 160 N. Y. S. 422; *Longacre v. Yonkers R. R. Co.*, 191 App. Div. 770, 182 N. Y. S. 373.

### § 342. Identity of Subject Matter.

The Civil Practice Act, sec. 348, provides that the former testimony may be given or read in evidence at a subsequent trial "of the same subject matter in the same or another action or special proceeding." It is not necessary that the cause of action shall be identical, but only that the subject matter to which the evidence relates shall be the same. *Cohen v. L. I. R. R. Co.*, 154 App. Div. 603, 139 N. Y. S. 887, *Richardson's Cases in Evidence*, p. 569; *Hassett v. Rathbone*, 204 App. Div. 229, 198 N. Y. S. 381. In that case, the plaintiff sued as administratrix of her daughter's estate, for damages for the death of her intestate, caused by the negligence of the defendant. The plaintiff offered in evidence the testimony of a deceased flagman, given on the trial of a similar action brought by the plaintiff as administratrix of her son, who was killed in the same accident. The Appellate Division, in holding this evidence admissible said, at p. 605: "The subject matter' to which the evidence relates, to wit, the negligence or lack of negligence of defendants' servant is the same in both actions." See, also, *Profitos v. Comerma*, 94 Misc. 334, 158 N. Y. S. 369.

### § 343. Identity of Parties.

The Civil Practice Act requires that the subsequent action must be between the same parties or their legal representatives. The rule as it was understood at common law is stated in *Jackson v. Lawson*, 15 Johns. (N. Y.) 539, as follows: "The rule is that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate or privies in law." The Court of Appeals has held that the amendment to the Code of Civil Procedure, sec. 830, in 1899

(Civil Practice Act, sec. 348), adding the words "or their legal representatives" was not intended to modify the common law rule. *Shaw v. N. Y. El. R. R. Co.*, 187 N. Y. 186, 79 N. E. 984. It was held in that case that the bringing in, as additional defendant, of a party who had become lessee of the premises in question since the former trial, did not render inadmissible the former testimony of one of plaintiff's witnesses who had died pending the second trial.

An executor or administrator is identified as a privy in law of his testator or intestate. *Osborne v. Bell*, 5 Denio, (N. Y.) 370, 49 Am. Dec. 275; *Wilbur v. Selden*, 6 Cow. (N. Y.) 162. See 38 Am. Dec. 481, note. A remainderman or reversioner is privy in estate with the life tenant. *Jackson v. Lawson*, *supra*; *Shook v. Fox*, 126 App. Div. 565, 110 N. Y. S. 951. A grantee is privy in estate with his grantor. *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671. Thus, A sues B for damages for raising the height of a dam, thereby causing an overflow on A's land. A derived his title from C, and B derived his from D. A offers X's testimony, given at a former trial between C and D concerning the same subject matter. X has since died. X's testimony is admissible. *Yale v. Comstock*, 112 Mass. 267.

The fact that a party sued or was sued in a different capacity in the former action is held immaterial, provided the issues are substantially the same. *Pratt, Hurst & Co., Ltd. v. Tailer*, 135 App. Div. 1, 119 N. Y. S. 803; *Cohen v. L. I. R. R. Co.*, 154 App. Div. 603, 139 N. Y. S. 887, *Richardson's Cases in Evidence*, p. 569. Upon the trial of an action for the conversion of certain building blocks, the plaintiff offered in evidence the testimony of a deceased witness, given in a criminal proceeding against the same defendant, instituted by the plaintiff as complainant, for the felonious taking of the said building blocks. The Supreme Court, Appellate Term, held that, although technically the people of the state were the plaintiff in the criminal proceeding, nevertheless, since the plaintiff in the instant action was complainant in the former proceeding and the defendant was the same in both, and since the subject matter was

precisely the same, viz., defendant's possession and right of disposition of the building blocks, the evidence should be admitted. *Profitos v. Comerma*, 94 Misc. 334, 158 N. Y. S. 369.

#### **§ 344. Opportunity of Cross-Examination on Former Trial.**

"The fundamental ground upon which evidence given by a witness, who afterwards dies, may be read in evidence on a subsequent trial, is that it was taken in an action or proceeding where the parties against whom it is offered, or their privies, have had both the right and the opportunity to cross-examine the witness as to the statement offered." *Young v. Valentine*, 177 N. Y. 347, 357, 69 N. E. 643. This is the test applied in all of the cases. *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211; *Cohen v. L. I. R. R. Co.*, 154 App. Div. 603, 139 N. Y. S. 887, *Richardson's Cases in Evidence*, p. 569; *Profitos v. Comerma*, 94 Misc. 334, 158 N. Y. S. 369. It is not necessary to show that there was a cross-examination of the witness at the former trial, but it must appear that there was, at least, an opportunity for such cross-examination by the opponent. A failure to exercise the right of cross-examination is deemed a waiver of the privilege. *Bradley v. Mirick*, 91 N. Y. 293.

#### **§ 345. Method of Proving Former Testimony.**

The former testimony may be proved by any one who heard it. Civil Practice Act, sec. 348; *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724. Thus, a juror, witness, attorney, judge or stenographer is competent. Notes or memoranda of the testimony may be used to refresh the memory of a witness and, when properly proved to have been taken accurately, may even be received as evidence of the testimony given at the former trial. *Trimmer v. Trimmer*, 90 N. Y. 676; *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287, 290. Minutes of the testimony taken by the judge are admissible, *Martin v. Cope*, 28 N. Y. 180; or the judge himself may be a witness, *Grimm v. Hammel*, 2 Hilt. (N. Y.) 434.

The stenographer's notes may be received in evidence. If the stenographer has since died, or become incompetent, his original notes may be read in evidence by any person whose competency to read them accurately is established to the satisfaction of the court. Civil Practice Act, sec. 348.

### **§ 346. Substance of Former Testimony.**

Formerly, the witness called to prove the testimony of a deceased witness was required to give his precise words. But the substance of the testimony is now held to be sufficient. To require the exact words would, in effect, abrogate the rule allowing the secondary evidence in such cases. But it must be of the whole, both direct and cross-examination, and not a part of what was said by the witness. *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287, 290; *State v. Able*, 65 Mo. 357; *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 67 N. E. 249.

### **§ 347. Testimony Subject to Legal Objections.**

The testimony thus given or read in evidence is regarded as if given by the witness on the stand at the trial and is subject to any legal objection that may be taken to it at the time when it is offered in evidence, other than the objection that the witness is not testifying in person, or that since the former testimony was given the witness has become disqualified under the Civil Practice Act, sec. 347. Civil Practice Act, sec. 348; *Murphy v. McMahon*, 179 App. Div. 837, 167 N. Y. S. 270. The fact that no objection was made to such testimony on the former trial, or that objection was made and overruled and the testimony received is immaterial. *Pratt, Hurst & Co., Ltd. v. Tailer*, 135 App. Div. 1, 119 N. Y. S. 803.

### **§ 348. Want of Jurisdiction.**

The want of jurisdiction of the case at the first trial is ground for rejecting the former testimony at the second hearing, for everything that was done was utterly void. *Deering v. Schreyer*, 88 App. Div. 457, 85 N. Y. S. 275.



**§ 349. Rule in Criminal Cases.**

The rule as to admitting the testimony of a witness at a former trial is the same in criminal as in civil cases. The admission of testimony given at a former trial of the accused for the same offense does not violate the constitutional right of the accused to be confronted with the witnesses against him, because at the former trial the accused was thus confronted. *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318; *Smith v. State*, 147 Ga. 689, 95 S. E. 281, fully annotated 15 A. L. R. 490.

## CHAPTER XVIII.

### ADMISSIONS

#### § 350. Nature of Admission.

An admission is a statement made or an act done which amounts to a prior acknowledgment by one of the parties to an action that one of the facts relevant to the issues is not as he now claims. Any statement or conduct of a party which is inconsistent with the stand taken by that party at the time of the trial may be given in evidence against him as an admission.

#### § 351. Function of Admission.

Formerly, our most eminent writers of treatises on evidence have taken the view that the function or purpose of an admission is not to prove some fact, but to discredit a party by showing that on some other occasion he made a statement which is inconsistent with his present claims, on the same theory that prior contradictory statements of a witness are used to impeach his testimony. *Greenleaf on Ev.*, 16th Ed., sec. 169; *Wigmore on Ev.*, sec. 1048. But recent decisions in the highest courts of our own and other jurisdictions fail to support this contention. The overwhelming weight of authority now holds that admissions are received, not for a purely destructive purpose, but as affirmative evidence of the facts admitted, sufficient in some cases to establish a cause of action or a defense. *Gangi v. Fradus*, 227 N. Y. 452, 125 N. E. 677; *Retter v. Olean St. Ry. Co.*, 140 App. Div. 667, 125 N. Y. S. 674. In a case where by statute, supporting evidence was required in order to sustain a conviction, the Appellate Division held that an admission of the accused constituted such supporting evidence. *People v. Cascia*, 191 App. Div. 376, 181 N. Y. S. 855. For an able discussion and review of authorities on this subject, see Professor Edmund M. Morgan's disserta-

tion on Admissions as an Exception to the Hearsay Rule,  
Yale Law Journal (Feb. 1921), Vol. 30, p. 355.

### § 352. Admissions Distinguished from Declarations against Interest.

An admission must appear to be against the interest of the party at the time of trial, but need not be against his interest at the time it was made. While an admission may, therefore, be a declaration against interest, it is not necessarily so, for at the time it was made it may have been favorable to the declarant's interest. The fact that an admission was against the interest of the party making it, undoubtedly adds to its probative value (*Mindlin v. Dorfman*, 197 App. Div. 770, 189 N. Y. S. 265), but has no bearing upon the question of its admissibility in evidence.

A declaration against interest may be introduced in evidence by or against anyone, whereas an admission may be used only against one of the parties to the action, who is responsible for the making of the admission.

Declarations against interest are admissible only when the declarant is dead, whereas the party whose admission is offered in evidence may be living and present at the trial.

A declaration against interest is competent only if made *ante litem motam*, whereas an admission may be made at any time. *N. Y. Water Co. v. Crow*, 110 App. Div. 32, 96 N. Y. S. 899, *aff'd* 187 N. Y. 516, 79 N. E. 1112.

### § 353. Admissions Distinguished from Confessions.

"In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomsoever made." *Reed v. McCord*, 160 N. Y. 330, 341, 54 N. E. 737, *Richardson's Cases in Evidence*, p. 590. Similarly, in a criminal prosecution, any declaration or act of the accused which is inconsistent with the present points of his proof may be received in evidence as an admission. But a direct assertion by the accused of the truth of the charge against him is regarded as a confession and its admissibility is determined

by the rules relating to confessions, and not admissions. See Chapter on Confessions.

**§ 354. Admissions Distinguished from Self-Contradictory Statements of Witness.**

The most important practical distinction between admissions of a party and self-contradictory statements of a witness lies in the fact that the latter may not be given in evidence unless the witness has first been warned, while on the stand, by being asked whether at a certain time, place, and to a certain person he made the statement about to be offered as a self-contradiction, whereas an admission may be given in evidence without a prior warning to the party. *Mindlin v. Dorfman*, 197 App. Div. 770, 189 N. Y. S. 265; *Cady v. Doxtator*, 193 Mich. 170, 159 N. W. 151, 14 A. L. R. 10. As stated by Mr. Justice Page, in *Mindlin v. Dorfman*, *supra*, at p. 771: "It is one of the elementary principles of the law of evidence that the statements of a party as to any fact in issue, or relevant to any issue, are admissible as primary evidence against the person by whom they are made."

**§ 355. Best Evidence Rule Applicable to Admissions.**

In New York, the admissions of a party are competent evidence only when parol evidence of the fact claimed to be admitted would be competent. *Sherman v. People*, 13 Hun 575, *Richardson's Cases in Evidence*, p. 352.

**§ 356. Admissions as an Exception to the Hearsay Rule.**

The classical writers, who have taken the view that admissions are received in evidence for the sole purpose of discrediting a party by proving inconsistencies and not as testimonial evidence of the facts admitted, have naturally held, as a logical result of such reasoning, that any witness who heard an admission made may testify to that fact without encountering the Hearsay Rule. But since it is now well settled that admissions are received in evidence for the purpose of proving the truth of the facts admitted, the logical

conclusion is that they are, in fact, received as an exception to the Hearsay Rule. The question is largely an academic one, for the law is too well settled that the admissions of a party may always be received in evidence against him for the courts to concern themselves with the question of their admissibility under an exception to the Hearsay Rule.

### § 357. Admissions Based on Hearsay.

Admissions are not subject to the rules of testimonial qualifications. Ordinarily a witness must speak from his own personal knowledge of the facts, but in cases involving admissions, such requirement is unnecessary. If a person makes a statement as matter of fact, it is admissible, although his knowledge of the fact is based wholly upon hearsay reports. But if he simply repeats, and so states, what another has said, his statement is pure hearsay and would not be admissible as an admission. To illustrate: In an action for death caused by negligence, it was shown that the defendant, who was concededly not present when the accident occurred, stated at the coroner's inquest that at the time of the injury the dog of the machine was not in position, which caused the accident. The Court of Appeals held that, although this statement was obviously based upon what the defendant had learned from others as to the situation and the cause of the accident, nevertheless, since it was a plain admission by the defendant of a fact relevant to the issue, it should be received in evidence against him. If, however, the defendant had merely said that he had heard that the accident occurred in the manner stated, his statement would be inadmissible, since such a statement would not amount to an admission of the fact stated but would be a mere statement of what he had heard. The theory upon which this rule rests is that the party has adopted and endorsed the statement of a third party, by making the statement without stating its source, and that he intends to be bound thereby. *Reed v. McCord*, 160 N. Y. 330, 340, 54 N. E. 737, *Richardson's Cases in Evidence*, p. 590. See, also, *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87



N. E. 77, Richardson's Cases in Evidence, p. 596; *People v. Smith*, 172 N. Y. 210, 236, 64 N. E. 814; *Schoenherr v. Hartfield*, 172 App. Div. 294, 158 N. Y. S. 388.

### § 358. Classification of Admissions.

Admissions may be either judicial or extrajudicial. A judicial admission is one made on the record or in connection with judicial proceedings. All other admissions are extrajudicial. Judicial admissions may be divided into two classes, formal and informal.

### § 359. Formal Judicial Admissions.

Formal judicial admissions are not properly classed as evidence at all, but, rather, take the place of evidence, according to the rules of judicial procedure. They are not offered in evidence as admissions against interest, but are, by the rules of judicial procedure, made conclusive of the facts admitted therein, in the action in which they were made. 14 A. L. R. 22, note; *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 32 N. E. 1076. They include facts admitted by the pleadings, by a confession of judgment, or by an agreed statement of facts or other stipulation, and facts expressly and formally admitted in open court by a party or his attorney, as by an express waiver of proof of a certain fact, or a plea of guilty in a criminal prosecution. When not expressly limited to a particular time, purpose, or occasion, formal judicial admissions are binding on the parties throughout the entire litigation, unless modified or relieved by order of court. *Clason v. Baldwin*, 152 N. Y. 204, 46 N. E. 322; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 46 Law. Ed. 968, 22 Sup. Ct. Rep. 698. To illustrate: In an action to recover the salary of an office, the appellants contended that there was no proof that the salary in question had been paid by the city to one McGuire. It was shown, however, that the record of a former trial of the same action contained the following admission by the plaintiff: "It is admitted that during the time John A. Stemmler was ousted from office

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the defendant paid the salary to Joseph McGuire." The Court of Appeals held this a general admission, not limited to the first trial, but binding upon the parties during the entire litigation. *Stemmler v. Mayor*, 179 N. Y. 473, 482, 72 N. E. 581, *Richardson's Cases in Evidence*, p. 600. See, also, *Fried v. N. Y., N. H. & H. R. R. Co.*, 183 App. Div. 115, 122, 170 N. Y. S. 697, *aff'd* 230 N. Y. 619, 130 N. E. 917.

### § 360. Informal Judicial Admissions.

Informal judicial admissions include facts incidentally admitted in the course of a trial or judicial proceeding, as in statements made by a party as a witness, or contained in his deposition or affidavit, and may be received in evidence as admissions against interest in the same or any subsequent litigation. *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724. Facts incidentally admitted in the pleadings, as well as formal judicial admissions which were made in other actions or which have been withdrawn or modified, so that they are no longer conclusive, are competent as admissions against interest, and should properly be classed as informal judicial admissions. 22 C. J., p. 329. To illustrate: An admission contained in a pleading in one action may be given in evidence against the pleader on the trial of another action, provided the statement is relevant to the issues in the action in which it is offered as an admission. It must first be shown, however, by the signature or verification of the party, or otherwise, that the facts were inserted with his knowledge and approval. *Cook v. Barr*, 44 N. Y. 156; *Taft v. Little*, 178 N. Y. 127, 134, 70 N. E. 211; *Reno v. Bull*, 226 N. Y. 546, 124 N. E. 144. Similarly, in cases where the pleadings have been amended so as to make an issue of a fact which was admitted by the original pleadings, the original pleading, verified by the party against whom it is offered, may be received in evidence as an admission of the fact now put in issue by the amended pleading. *Breese v. Graves*, 67 App. Div. 322, 73 N. Y. S. 167; *Vermeule v. City of Corning*, 186 App. Div. 206, 174 N. Y. S. 220; *Hess v. Vinton Colliery Co.*, 255 Pa. 78, 99 Atl. 218,

annotated 14 A. L. R. 1. Any incidental admission of fact contained in a verified pleading, even if not conclusive against the pleader, may be given in evidence as an admission against him. Where all of the defendants unite in an answer, the admissions therein are to be treated, in the action in which the pleading is served, as the admissions of each, and not confined to the person actually verifying the same. *Talbot v. Laubheim*, 188 N. Y. 421, 81 N. E. 163; *Herbert v. Otto Gerdau Co.*, 186 App. Div. 916, 172 N. Y. S. 580.

### § 361. Extrajudicial Admissions.

All admissions not made in the course of judicial proceedings are extra-judicial admissions. They include any oral or written statements, or conduct, of a party, or his legal representative, which are inconsistent with the claim of that party with respect to some fact relevant to the issues at the trial. To illustrate: A sues B for the loss of his sheep, alleging that B's dog killed them, and, upon the trial, offers evidence that B killed his dog and, when so doing, remarked: "The dog will kill no more sheep." This evidence was received as an admission, in *Anderson v. Halverson*, 126 Iowa 125, 101 N. W. 781. For numerous illustrations see authorities collated in 22 C. J., p. 297, note.

### § 362. Admissions Implied by Conduct.

Prior acts or conduct of a party which are inconsistent with his present claims may be shown as admissions. 22 C. J., p. 317. To illustrate: Where a party, to whom a bill for goods was presented for payment, struck out one of the items and wrote against it "never got it," the court held that, from these facts, it might be inferred that he admitted having received the other items in the bill. *Power v. Root*, 3 E. D. Smith (N. Y.) 70. An endeavor to obtain an extension of time for the payment of a note has been received in evidence as an admission inconsistent with a claim that the note was signed under duress. *International*

*Harvester Co. v. Voboril, 187 Fed. 973. The receipt of sick benefits is an implied admission that the recipient was ill. Seidenspinner v. Met. Life Ins. Co., 175 N. Y. 95, 67 N. E. 123.*

The flight of the accused after the commission of the crime is always received as an admission of guilt. *Allen v. United States*, 164 U. S. 492, 41 Law. Ed. 528, 17 Sup. Ct. Rep. 154. Similarly, any suspicious conduct giving rise to an inference of guilt is competent as an admission. In both civil and criminal actions, evidence of an attempt to bribe or coerce a witness is received as an admission that the case is weak. *Nowack v. Metropolitan Street Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, *Richardson's Cases in Evidence*, p. 668; *People v. Shilitano*, 218 N. Y. 161, 112 N. E. 733.

But evidence of repairs made after an accident is inadmissible as an admission of negligence, because the adoption of additional safeguards after an accident is not necessarily inconsistent with the claim of freedom from responsibility for the happening of the accident. Similarly, the fact that a motorman was discharged after an accident may not be proved as an admission of negligence by the defendant. *Engel v. United Traction Co.*, 203 N. Y. 321, 96 N. E. 731.

### § 363. Admissions Implied by Silence.

Silence, when one ought to speak, is often as significant as an express admission. Where a statement is made in the presence of a party, under such circumstances that the party heard and understood what was said and had an opportunity to reply, and would naturally reply unless he admitted the truth of the statement made to him, the statement, together with the fact of his silence, will be received in evidence as a tacit admission of its truth. *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; *Wallace v. Wallace*, 158 App. Div. 273, 276, 137 N. Y. S. 43, *aff'd* 216 N. Y. 28, 109 N. E. 872; *Cohen v. Toole*, 184 App. Div. 70, 171 N. Y. S. 577; 22 C. J., p. 321. The courts are most strict, however, in requiring that the evidence be brought clearly within the rule. If the person addressed was in such



physical condition that it is not clear that he heard or understood what was said, or if he was not perfectly familiar with the language spoken, the statements made to him will not be received in evidence, since no acquiescence could be inferred from his silence. *People v. Koerner*, 154 N. Y. 355, 373, 48 N. E. 730; *Schilling v. Union Ry. Co.*, 77 App. Div. 74, 78 N. Y. S. 1015; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287. Statements made to a person who is not permitted to reply are, of course, excluded. *People v. Kennedy*, 164 N. Y. 449, 58 N. E. 652. Similarly, a failure to reply to statements made in the course of judicial proceedings does not constitute an admission. Statements made in a language of which the accused understood but little, and accusing the defendant of a crime, must be excluded. *People v. Lewis*, 238 N. Y. 1, 143 N. E. 771; *People v. Willet*, 92 N. Y. 29; *Leggett v. Schwab*, 111 App. Div. 341, 97 N. Y. S. 805. In *Leggett v. Schwab*, *supra*, the Court said: "The reason for the exception is that the inference, if any, would arise from the party's failure to speak out informally at an improper time, where an interruption to deny would violate the decorum of the occasion." The leading Massachusetts case of *Commonwealth v. Kenney*, *supra*, is authority for the proposition that the silence, in the face of charges against him, of a person under arrest is incompetent as an admission, on the theory that the situation is analogous to a judicial proceeding. See, also, *Commonwealth v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120. And there have been dicta in the Court of Appeals of this State in support of that view. *People v. Smith*, 172 N. Y. 210, 234, 64 N. E. 814; *People v. Marendi*, 213 N. Y. 600, 613, 107 N. E. 1058. The question was directly in issue, however, in *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342, and the Court of Appeals held that it was no objection to the admissibility in evidence of the admissions of the accused, whether express or implied by his silence, that they were made while he was under arrest. This decision was followed in *People v. Cascia*, 191 App. Div. 376, 181 N. Y. S. 855; Editorial, *New York Law Journal*, August 15, 1924.



**§ 364. Admissions Not Implied by Unanswered Written Communications.**

Unanswered written communications are not, ordinarily, admissible in evidence, against the person addressed, as admissions of the truth of statements contained therein, for the reason that a person to whom a letter is addressed is, ordinarily, under no duty to make any reply. There is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them. *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508, *Richardson's Cases in Evidence*, p. 610; *Thomas v. Gage*, 141 N. Y. 506, 36 N. E. 385; *Viele v. McLean*, 200 N. Y. 260, 93 N. E. 468; *Kumin v. Fine*, 229 Mass. 75, 118 N. E. 187; Editorial, *New York Law Journal*, January 4, 1927.

**§ 365. Admissions by Acquiescence in Bills Rendered.**

When one party sends a bill to another party, and the latter keeps it and fails to make objections to it within a reasonable time, that fact may be proved as an admission of the correctness of the bill and is sufficient to justify the first party in suing on the theory of an account stated. Failure to object within a reasonable time is not conclusive of the fact of actual agreement to the correctness of the account, but is merely competent evidence as an admission, subject to be rebutted by proof of circumstances from which counter inferences may be drawn. *Lockwood v. Thorne*, 18 N. Y. 285, *Richardson's Cases in Evidence*, p. 615; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817; *Bradley v. McDonald*, 218 N. Y. 351, 388, 113 N. E. 340; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, 19 Law. Ed. 884. As stated by the Court in the case last cited: "The principle which lies at the foundation of evidence of this kind is that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent

from home, suffering from illness, or expected shortly to see the other party, and intended, and preferred, to make his objections in person."

An account stated is *prima facie* evidence of the correctness of the balance acknowledged, but it may be impeached by proof of fraud, omission, or mistake. *Dodson v. Watson*, 110 Tex. 355, 220 S. W. 771, annotated 11 A. L. R. 583.

Likewise, where the addressee denies receipt of a bill alleged to have been mailed to him, the mailing operates only as presumptive evidence, and silence under such circumstances cannot be construed as assent to an account stated. *Curry v. MacKenzie*, 239 N. Y. 267, 146 N. E. 375.

### § 366. Offers of Compromise.

An offer to compromise or settle a question or claim in dispute is not an admission of liability. Such offers are, therefore, inadmissible. This principle is based upon the theory that the law favors settlements of controverted claims. The offer implies merely a desire for peace, and not a concession of a liability or wrong done. Under a contrary rule, no attempt to amicably settle disputes could safely be made. To illustrate: Where defendant wrote, "To save costs and stop further litigation, we are willing to send you our check for fifty dollars in full liquidation of your claim," it was held that the statement was inadmissible. *Smith v. Satterlee*, 130 N. Y. 677, 29 N. E. 225, *Richardson's Cases in Evidence*, p. 621. See, also, *Tennant v. Dudley*, 144 N. Y. 504, 39 N. E. 644; *Wemyss Furniture Co. v. Strober*, 199 App. Div. 449, 191 N. Y. S. 783. But a distinct, unqualified admission of an independent fact, made, not as a part of an attempted adjustment, but because it was an acknowledged fact, will not be excluded merely because it was made in the course of negotiations for settlement or compromise. *White v. Old Dominion Steamship Co.*, 102 N. Y. 661, 6 N. E. 289, *Richardson's Cases in Evidence*, p. 622; *Harrington v. Lincoln*, 4 Gray (Mass.) 563, 64 Am. Dec. 95. If the admission is expressly stated to be "without prejudice," or if

it appears to have been made tentatively or hypothetically, or if it is of such a nature that the court can see that it would not have been made except for the purpose of effecting a settlement, so that an agreement that it was to be deemed made "without prejudice" could be fairly implied from the circumstances, it will be excluded. *Roome v. Robinson*, 99 App. Div. 143, 90 N. Y. S. 1055.

A voluntary offer to pay damages for another's injury cannot be construed where there is no dispute between the parties, as an offer of compromise. But an offer to pay damages in reply to a demand by the injured party or by a stranger who would be under no obligation to provide for the injured party, may be received in evidence as an admission of liability. *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695; *Walton v. Kane*, 4 Misc. 296, 23 N. Y. S. 1029; *Story v. Nidiffer*, 146 Cal. 549, 80 Pac. 692. But an offer of assistance to an injured employee, made by his employer after an accident, is held inadmissible. To illustrate: In a personal injury action by an employee against his employers, the plaintiff proved that the defendants offered to pay his doctor's bill and his wages while he was disabled. The Court of Appeals reversed on the ground that this evidence was improperly received as an admission of liability, since such an offer might be construed as a voluntary act of benevolence, not at all inconsistent with the defendant's claim of freedom from responsibility for the accident. *Grogan v. Dooley*, 211 N. Y. 30, 105 N. E. 135.

### § 367. Admissions Must Be of Fact.

An admission must amount to an acknowledgment of a fact, as distinguished from a mere expression of opinion or intention. To illustrate: A remark that "one of the girls must have left the faucet open" is nothing more than an expression of opinion. *Aschenback v. Keene*, 46 Misc. 600, 92 N. Y. S. 764. A statement by the plaintiff that he would make no claim for damages cannot be construed as an admission that he suffered none. *Driscoll v. City of Taunton*, 160 Mass. 486, 36 N. E. 495.

**§ 368. The Whole Statement or Admission to be Received.**

Where part of a conversation or writing has been received in evidence as an admission, the party against whom it is offered has the right to prove any other statement made by him at the same time which tends to modify or destroy the effect of the admission. *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Platner v. Platner*, 78 N. Y. 90; *Grattan v. Met. Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372. In *Grattan v. Met. Life Ins. Co.*, *supra*, the defendant introduced in evidence, as an admission against the plaintiff, an extract from a letter written by the insured. The Court said, at p. 284: "The defendant introduced the letter and read so much of it as admitted that the applicant knew that his sister died of consumption, and the plaintiff read the rest under objection and exception. We think she had the right to do so. The whole of the letter was one connected narrative and an explanation of a single definite accusation. It was written to contradict the charge of a false representation as to the cause of the sister's death. To read part of it and suppress the rest distorts its purpose and meaning and turns a justification into a confession. The plaintiff could not have read it at all. When the defendant read a part of it he was bound to take with it all that explained or qualified what preceded."

**§ 369. Explanation of Admissions.**

"Where declarations or acts of a party are offered in evidence as admissions against himself and calculated to show that his present attitude is inconsistent therewith, it is always competent for him to offer an explanation." *Chamberlain v. Iba*, 181 N. Y. 486, 74 N. E. 481, *Richardson's Cases in Evidence*, p. 632. This he may do by means of his own testimony or by introducing any other evidence calculated to explain the apparent inconsistency between the alleged admission and his present claim. *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406; *Collins v. Kelly*, 226 N. Y.



180, 123 N. E. 74; Rubin v. Siegel, 188 App. Div. 636, 177 N. Y. S. 342.

Thus, where a letter head containing words "Trusts Estate" had been used as an admission against a party, the court ruled that it was error not to permit the party to explain it. No. 615 Flatbush Ave. Corp. v. Hatoff et al., 126 Misc. 573, 214 N. Y. S. 138.

### **§ 370. Weight and Probative Value of Admissions for Jury.**

Any difficulties which the courts of this State have experienced in determining and stating the weight to be given to admissions, as compared with other forms of evidence, have been resolved by the Court of Appeals, in Gangi v. Fradus, 227 N. Y. 452, 125 N. E. 677. In the language of the Court, at p. 456: "They (admissions) have two phases for the jury's consideration: the one, were they made; the other, their effect. In neither phase have they any characteristic or quality peculiar to themselves, or distinguishing them from the other facts in evidence." And again, at p. 457: "In case they were made in ignorance of the facts or in abnormal state of mind, or were based in part upon mere opinion, or were made casually or thoughtlessly or insincerely . . . . ., they may, in reason, deserve slight consideration or value or none at all. In case they were made understandingly and deliberately, are of pure fact within the knowledge of the declarant, and were made under conditions and circumstances conducive to veracity, and are not overborne by the other facts in evidence, they may, in reason and sound judgment, establish a cause of action or a defense. Whether they are of the one class or the other, or intermediate, is for the determination of the jury. The effect they shall have upon the issues being tried is for their determination. The trial justice may not instruct as to the rank assignable to them or the influence to be yielded by them. The jury may accept a part as true and put aside a part as not true. In those respects the law has no gauge. The jury shall determine whether or not they were made;



if made, the conditions and circumstances under which they were made and the effect thereof, and their probative weight and value which may range from the lowest, or none at all, to conclusiveness. The trial justice may profitably and without error, as the evidence justifies, bring to the jury's attention and guidance the rules of law that the probative effect and value of an admission depend upon the conditions and circumstances under which they were made, the time which has since elapsed and the cogency or reasonableness of the explanation, if any, of the making and other like grounds and conditions. The trial justice should also, as the evidence makes useful and proper, instruct the jury concerning the degree of scrutiny and caution in determining whether or not the admissions were in truth made. Judicial opinion is, at times, not clear, if not misleading, through treating without distinguishment the evidence of the making of the admission with that of the contents of the admission. The making of an admission of strong effect may have in support only faint and dubious evidence, without justifying the declaration that admissions are a weak or dangerous kind of evidence. The weakness or danger is, in such case, in the proof of the making and not in the contents of the admission."

Nevertheless, in the Matter of Ennever, 116 Misc. 32, 189 N. Y. S. 177, the learned Surrogate held that the bare admissions of a decedent, even though believed to have been made, were insufficient, as matter of law, to support a claim against his estate. In distinguishing *Gangi v. Fradus*, *supra*, the Court said, at p. 35: "Where the decedent's lips are sealed in death, I hesitate to give his admissions against interest that probative effect and value that I might apply were he alive, present in court, and able to testify in denial or explanation."

**PARTIES WHOSE ADMISSIONS ARE RECEIVABLE****§ 371. Admissions by Parties to the Record.**

The admissions of a party to the record are always admissible against that party. *Reed v. McCord*, 160 N. Y. 330, 341, 54 N. E. 737, *Richardson's Cases in Evidence*, p. 590; *Mindlin v. Dorfman*, 197 App. Div. 770, 189 N. Y. S. 265.

**§ 372. Admissions by Co-Parties.**

The admissions of a party are not receivable against his co-plaintiffs or co-defendants merely because they happen to be joined as parties to the action. *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Whaples v. Fahys*, 109 App. Div. 594, 96 N. Y. S. 323; *Sparf and Hansen v. United States*, 156 U. S. 51, 39 Law. Ed. 343, 15 Sup. Ct. Rep. 273, *Richardson's Cases in Evidence*, p. 635. An excellent illustration is found in the case of *Scully v. Scully*, 179 App. Div. 266, 166 N. Y. S. 464. In an action for divorce, the trial court received in evidence extra-judicial admissions of the defendant wife, confessing her adultery with the correspondent. The Appellate Division reversed the judgment on the ground that these admissions, although competent against the wife, were incompetent against the correspondent, even though the offense was joint and it is clear that both parties must have been equally guilty or equally innocent.

**§ 373. Admissions by Parties in Will Cases.**

The rule that the admissions of a party to the record are always admissible against himself even though they may be incompetent against his co-plaintiffs or co-defendants is not applied in will cases, since the will cannot be admitted as to one and rejected as to another. *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442, *Richardson's Cases in Evidence*, p. 533. To illustrate: If the probate of a will is contested on the ground of testamentary incapacity, the admissions of one of the devisees that the testator was mentally incompetent when he made the will would be inadmissible as

against the others; and as it would be impossible, upon the issue raised, to limit the effect of the admissions so as to restrict them to the devisee who made them, they would be inadmissible even against him. But in the case of a sole devisee or legatee, his admissions would be competent evidence. *Matter of Campbell*, 67 App. Div. 418, 73 N. Y. S. 753.

### § 374. Admissions by Nominal Parties.

Where an action is prosecuted or defended in the name of a person other than the real party in interest, the admissions of the nominal party are not receivable to defeat the claim of the real party in interest. To illustrate: An admission made by a guardian *ad litem* is inadmissible against the infant plaintiff. *Geraty v. Nat. Ice Co.*, 16 App. Div. 174, 181, 44 N. Y. S. 659, *aff'd* 160 N. Y. 658, 55 N. E. 1095; *Schlotterer v. Brooklyn & N. Y. Ferry Co.*, 75 App. Div. 330, 78 N. Y. S. 202, 14 A. L. R. 87.

### § 375. Admissions by Executors and Administrators.

Executors and administrators are not considered nominal parties within the rule above stated. An executor or administrator is deemed to represent the estate itself and not any person beneficially interested therein. His admissions against interest, therefore, made while acting in his official capacity and within the scope of his duties, are admissible against the estate. *Simon v. Etgen*, 213 N. Y. 589, 598, 107 N. E. 1066; *Breese v. Graves*, 67 App. Div. 322, 73 N. Y. S. 167. Such admissions, however, must appear to have been made by the sole executor or administrator or by all of them together, for the admissions of one executor or administrator are inadmissible against his co-executor or co-administrator. *Potter v. Greene*, 51 Hun 6, 3 N. Y. S. 605; *Finnern v. Hinz*, 38 Hun 465; *Spencer v. Hall*, 30 Misc. 75, 62 N. Y. S. 826, *aff'd* 51 App. Div. 623, 64 N. Y. S. 1149. See, also, *Union Bank v. Sullivan*, 214 N. Y. 332, 108 N. E. 558. Admissions made by executors or administrators while not acting in their official capacity are never admissible against

the estate. *Church v. Howard*, 79 N. Y. 415; *LeLong v. Siebrecht*, 196 App. Div. 74, 187 N. Y. S. 150.

### § 376. Admissions by Real Parties in Interest.

Admissions made by the real party in interest, on the other hand, are admissible against the nominal party representing his interest. 22 C. J., p. 353; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

### § 377. Admissions by One Not a Party to the Record.

Statements made by those who are not parties to the record are receivable as admissions against those who are whenever it is made to appear

1. That there is a privity of interest between the parties;
2. That a party to the record adopted or acquiesced in the statement, act or conduct of another;
3. That a party to the record referred to the declarant as authorized to speak for him; or
4. That the declarant was acting as agent for a party to the action.

### § 378. Admissions by Privies.

Privies are those who have an interest in any action or thing, and privity of interest is the mutual or successive relationship which permits one person's rights, obligations, or remedies to be affected by the statements or acts of another person. That such statements may be received in evidence as admissions it must be shown that the interest of the party making them is identified with the interest of the party against whom they are sought to be introduced. The privity of interest may be either (a) privity of obligation, or (b) privity of title.

#### PRIVITY OF OBLIGATION

### § 379. Generally.

What constitutes a privity of obligation so as to admit the statements of a person as the statements of the party to

the action is a question of substantive law, and not of evidence, determining the legal relationship of such person to the party-plaintiff or defendant. We shall present only a few of the many situations in which the question arises and where the principle finds constant application.

### § 380. Admissions by Joint Debtors.

Early decisions, both in the United States and England, established the rule that the admissions of one of two or more joint obligors are receivable against the others. The decision of Lord Mansfield, in the leading case of *Whitcomb v. Whiting*, 2 Doug. 652, 99 Eng. Rep. 413, that a payment made by one of four joint and several makers of a promissory note operated to prevent the debt from being barred by the Statute of Limitations as to all of the joint debtors, was placed on the ground that there was a *quasi* agency created by the contract, whereby the act of one was binding upon all. This decision was followed in *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Patterson v. Choate*, 7 Wend. (N. Y.) 441, and numerous other cases in New York and other jurisdictions, but the early doctrine, as represented by these cases, was expressly repudiated in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, and *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95. It is now the established rule in New York "that a part payment by one of two or more joint contractors does not take the case out of the Statute of Limitations as to the others, and this whether such payment is made before or after the debt has been barred." *Murdock v. Waterman*, 145 N. Y. 55, 64, 39 N. E. 829. See, also, *Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702. "It makes no difference that the payments were made with the knowledge of the other party liable for the same debt. To make payments effective against a party to save a claim from the statute, they must have been made by him, or for him by his authorized agent." *McMullen v. Rafferty*, 89 N. Y. 456, 460. The joint liability does not, of itself, make each of several joint debtors the agent of the others. Prior authorization or sub-



sequent ratification must be shown before statements or acts of one joint debtor will be received in evidence as admissions against the others. *Wallis v. Randall*, 81 N. Y. 164.

### § 381. Admissions by Partners.

After a partnership is shown to exist, an admission of one partner, relating to matters within the scope of the partnership business, is binding upon his co-partners, for, as to such matters, each partner is deemed the agent of the others. Upon dissolution of the partnership, however, the implied agency of the partners ceases, except as to matters necessary in order to wind up the partnership affairs, and, therefore, the power of one partner to bind his co-partners by admissions with respect to previous transactions ceases. *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Desbecker v. Cauffman*, 169 N. Y. 547, 62 N.E. 674. The declarations of one alleged partner are inadmissible against the others for the purpose of proving the partnership. *Franklin v. Hoadley*, 145 App. Div. 228, 130 N.Y.S. 47.

### § 382. Admissions of Principal as against Surety.

In cases of suretyship, the admissions of the principal, in connection with the obligation or duties to which the suretyship relates, made during the period in which the surety is bound, so as to constitute a part of the *res gestae*, are admissible against the surety. 22 C. J., p. 405. To illustrate: A receipt for goods by a principal is admissible in an action against his surety to recover the purchase price. *Rawson v. Adams*, 17 Johns. (N. Y.) 130. The official books and reports of a county treasurer are admissible, in an action against his sureties, to show the amount of money and securities in the treasurer's possession. *Supervisors of Monroe County v. Clarke*, 92 N. Y. 391. See, also, *State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1, *Richardson's Cases in Evidence*, p. 417. But admissions of the principal made subsequent to the act to which they relate are inadmissible against the surety. *Hatch v. Elkins*, 65

N. Y. 489; Strobel & Wilken Co. v. Wiesen, 144 App. Div. 149, 128 N. Y. S. 798; Griffen v. Edelman, 146 App. Div. 744, 131 N. Y. S. 450; Eichhold v. Tiffany, 20 Misc. 680, 46 N. Y. S. 534.

### § 383. Admissions by One of Several Conspirators.

When a conspiracy between certain parties has been proved, the admissions of each, made in furtherance of the common object, are admissible against all. To illustrate: Where a conspiracy in fraud of creditors between a debtor and his transferee has been proved, the acts and statements of either, in furtherance of the purpose to defraud, are competent against both parties. Dewey v. Moyer, 72 N. Y. 70, aff'd 103 U. S. 301, 26 Law. Ed. 394. But the admissions of one conspirator, made after the common design is accomplished or abandoned, are inadmissible against the others, because, to be competent, the declarations must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestae*, of some act done for that purpose. People v. Davis, 56 N. Y. 95; Garnsey v. Rhodes, 138 N. Y. 461, 34 N. E. 199; People v. Storrs, 207 N. Y. 147, 100 N. E. 730; Cohen v. Toole, 184 App. Div. 70, 171 N. Y. S. 577; Logan v. United States, 144 U. S. 263, 309, 36 Law. Ed. 429, 12 Sup. Ct. Rep. 617. The declarations of an alleged conspirator cannot be received for the purpose of proving the conspiracy. Cuyler v. McCartney, 40 N. Y. 221; Lent v. Shear, 160 N. Y. 462, 55 N. E. 2.

### § 384. Admissions by Joint Tort-Feasors.

There is no such joint interest between wrong-doers in actions for negligence, trespass, or other torts that the admissions of one can be used against the others. The declarations of one tort-feasor can be used against his joint tort-feasors only when they constitute a part of the *res gestae* or where a conspiracy has been proved. In the latter case, they are, of course, subject to the rules applicable to all admissions by fellow conspirators. Sparf and Hansen

v. United States, 156 U. S. 51, 39 Law. Ed. 343, 15 Sup. Ct. Rep. 273, Richardson's Cases in Evidence, p. 635.

### PRIVITY OF TITLE

#### § 385. Privies in Title.

Where one person succeeds to the same property rights formerly enjoyed by another, there is often such privity that the rights of the present owner may be affected by statements of the former owner. The principle is lucidly expounded by Cowen and Hill, in Notes to Phillips on Evidence, p. 644, as follows:

"The owner's estate or interest in the same property, afterwards coming to another, by descent, devise, right of representation, sale or assignment, in a word, by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, chose in possession or chose in action, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor claiming from him, either immediately or remotely. And in this instance, it makes no difference whether the declarant be alive or dead; for though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it *cum onere*; and as the predecessor might have taken a qualified right, or sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another."

This principle, as thus explained, is universally applied, except in New York, to admissions of former owners of both real and personal property, but is restricted in this State to admissions of former owners of real property.

**§ 386. Admissions by Former Owner of Real Property.**

Admissions of a former owner of real property, made before parting with the title, are admissible against those claiming under him, as grantees, heirs, devisees, etc., *Chadwick v. Fonner*, 69 N. Y. 404; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *N. Y. Water Co. v. Crow*, 110 App. Div. 32, 96 N. Y. S. 899, *aff'd* 187 N. Y. 516, 79 N. E. 1112; *People v. Ladew*, 102 Misc. 595, 170 N. Y. S. 196; provided such admissions do not tend to attack or destroy the record title, since that may not be attacked by parol evidence, *Gibney v. Marchay*, 34 N. Y. 301; *Hutchins v. Hutchins*, 98 N. Y. 56; *People v. Holmes*, 166 N. Y. 540, 60 N. E. 249. But a derogatory statement of a grantor made after parting with the title is inadmissible against the grantee or those claiming under him, irrespective of whether the transfer was a gift or a sale. *Vrooman v. King*, 36 N. Y. 477; *Williams v. Williams*, 142 N. Y. 156, 36 N. E. 1053; *Leary v. Corwin*, 63 App. Div. 151, 71 N. Y. S. 335; *Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. S. 1063; *Johnson v. Petersen*, 101 Neb. 504, 163 N. W. 869, annotated 1 A. L. R. 1235.

**§ 387. Admissions by Former Owner of Personal Property.**

In New York the declarations of a donor, vendor, or assignor of a chattel or chose in action, whether made before or after the transfer, are inadmissible to affect the claim or title of the donee, vendee, assignee, or any subsequent holder.

The rule forbidding the use of such declarations, known and characterized as the New York doctrine, was established by the opinion of Senator Lott, in *Paige v. Cagwin*, 7 Hill (N. Y.) 361, 42 Am. Dec. 68, *Richardson's Cases in Evidence*, p. 655. The case of *Paige v. Cagwin*, *supra*, was an action on a promissory note transferred for value after maturity. The principal question was whether the declarations of the payee, made while he was holder of the note, were admissible against the plaintiff. The Court, in ruling that the evidence was properly rejected, said: "It may, I



think, be laid down as a general proposition that the cases in which such evidence has been held admissible are those only where the declarations were made by a party really in interest, or by one through whom the plaintiff claimed as a party by representation, as in case of bankruptcy, death and others of similar character."

The rule of exclusion thus laid down has been followed consistently in this State. *Wangner v. Grimm*, 169 N. Y. 421, 62 N. E. 569; *Kelly v. Beers*, 194 N. Y. 60, 86 N. E. 985; *Tierney v. Fitzpatrick*, 195 N. Y. 433, 88 N. E. 750; *Scheps v. Bowery Savings Bank*, 97 App. Div. 434, 90 N. Y. S. 26; *Dinnebeil v. Ringer*, 101 Misc. 658, 167 N. Y. S. 952. In the well-known case of *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757, the rule was applied to the declarations of a mortgagee, offered by the mortgagor against the assignee of the mortgage for the purpose of defeating a foreclosure.

### **§ 388. Admissions by One Through Whom a Party Claims by Representation.**

An exception to the broad statement set forth in section 387, exists where the admissions of a former owner of real or personal property are introduced against one who claims through him by representation, such as an executor, administrator, heir, trustee in bankruptcy, etc. Admissions of a former owner of real or personal property against such a person are always admissible. *Spaulding v. Hallenbeck*, 35 N. Y. 204; *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730, *Richardson's Cases in Evidence*, p. 986; *Von Sachs v. Kretz*, 72 N. Y. 548. Admissions of a testator or intestate are always competent against his estate. *Gallagher v. Brewster*, 153 N. Y. 364, 47 N. E. 450; *Staley v. Nellis*, 188 App. Div. 325, 177 N. Y. S. 112.

In an action for death caused by negligence, admissions made by the decedent before his death are admissible against his personal representative, for the reason that the foundation of the claim is the injury to him for which he might have sued in his lifetime. Dec. Est. Law, sec. 130;



Hughes v. Delaware & H. Canal Co., 176 Pa. 254, 35 Atl. 190.

**§ 389. Declarations of Another Person Adopted by a Party.**

Whenever it appears that a party to the record has adopted the statements of another person and made use of them for any purpose connected with the case, such statements are receivable as admissions against that party. To illustrate: In an action on a life insurance policy, it appeared that the plaintiff had signed and delivered to the defendant a certificate in proof of her husband's death in which she stated that it was agreed that the certificate of the physician "shall be considered as part of proofs of death of insured." The Court of Appeals held that this rendered the certificate of the physician admissible against the plaintiff as an admission concerning the date when her husband became ill. *Klein v. Prudential Ins. Co.*, 221 N. Y. 449, 117 N. E. 942. See, also, *Wagner v. Allemania*, 71 Misc. 448, 128 N. Y. S. 629.

**§ 390. Admissions by Persons Referred to.**

Whenever a party refers an inquirer to a third person, as authorized to answer for him, he is bound by such person's admissions. This rule rests upon the theory that the third person is thereby constituted the agent of the party for the purpose of giving such information as relates to the subject of the inquiry. *Wehle v. Spelman*, 1 Hun 634; 22 C. J., p. 385. But it is only when the third person is authorized to answer for the party who has referred to him that the latter is bound by what the former may say. A mere reference to another person for information is not sufficient to imply any intention of giving to such person authority to speak for him. *Lambert v. People*, 76 N. Y. 220; *Alldridge v. Aetna Life Ins. Co.*, 204 N. Y. 83, 97 N. E. 399.

**§ 391. Admissions by Agents and Employees.**

The declarations of an agent are competent as admissions

against his principal, provided they are shown to have accompanied an act done on behalf of the principal, within the scope of the agent's authority, so that they can fairly be said to be a part of the *res gestae*. To illustrate: Upon the trial of the owner of a vessel for engaging in the slave trade, a witness testified that the master of the vessel offered to engage the witness as mate for a voyage which the master described as a voyage to East Africa for slaves and that the master offered the witness a bonus of five dollars per head for each prime slave brought to Cuba. These declarations of the master were held competent as admissions against the owner, on the ground that the master had authority to hire a crew and that his declarations, made as part of an attempt to hire, were in the strictest sense a part of the *res gestae*. *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 Law. Ed. 693. See, also, *Stecher Lithographic Co. v. Inman*, 175 N. Y. 124, 67 N. E. 213, *Richardson's Cases in Evidence*, p. 679; *Nowack v. Metropolitan Street Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, *Richardson's Cases in Evidence*, p. 668. But statements of an agent contained in a mere narrative of what occurred may not be received as admissions against his principal. To illustrate: The assertion of the defendant's motorman, after the happening of an accident, that he could not stop the car because the brakes were out of order was held inadmissible, in *Luby v. H. R. R. Co.*, 17 N. Y. 131, *Richardson's Cases in Evidence*, p. 546, on the ground that the declaration was no part of the motorman's act for which the defendant was sued. See, also, *Vadney v. United Traction Co.*, 188 App. Div. 365, 177 N. Y. S. 114. In an action for damages for the destruction of property by fire set by one of defendant's locomotives, a letter reporting the matter, written by the station agent to the general manager of the road, was held incompetent as an admission against the defendant. *Warner v. Maine Cent. R. R. Co.*, 111 Me. 149, 88 Atl. 403, 47 L. R. A. (N. S.) 830. But an admission contained in an employer's report of injury, made to the State Industrial Commission by an employee who had charge of reporting all accidents, was held

admissible against the employer, on the ground that it was within the scope of the agent's authority. *Anthus v. Rail Joint Co.*, 193 App. Div. 571, 185 N. Y. S. 314, *aff'd* 231 N. Y. 557, 132 N. E. 887. The conduct of an agent or servant after the happening of an accident may not be shown in an action against his principal, as an admission of negligence or fault. *Molino v. City of New York*, 195 App. Div. 496, 186 N. Y. S. 742. Admissions made by an agent outside the scope of his authority, or while not engaged in the discharge of his duties as agent, or after the agency has terminated, are inadmissible against the principal. *Taylor v. Commercial Bank*, 174 N. Y. 181, 66 N. E. 726; *State Bank v. Brocton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591; *Turner v. Northwestern Mut. Life Ins. Co.*, 232 N. Y. 171, 133 N. E. 435. The declarations of an alleged agent may not be used for the purpose of proving the fact of agency. *Leary v. Albany Brewing Co.*, 77 App. Div. 6, 79 N. Y. S. 130. See, also, *American Bar Association Journal*, January, 1928; *University of Pennsylvania Law Review*, November, 1927.

### § 392. Admissions by Husband and Wife.

No agency between husband and wife is implied from the mere fact of marriage. *LeLong v. Siebrecht*, 196 App. Div. 74, 187 N. Y. S. 150. The general rule is, therefore, that admissions of one spouse are inadmissible against the other, except in cases where actual agency has been proved. *Bouton v. Welch*, 170 N. Y. 554, 63 N. E. 539; *Hansen v. Vogelsang*, 139 App. Div. 759, 124 N. Y. S. 437. Actual agency may be implied from the conduct of the parties or established by proof of subsequent ratification, but declarations of the alleged agent are inadmissible for the purpose of proving agency. *Shesler v. Patton*, 114 App. Div. 846, 100 N. Y. S. 286. The same general principles apply to the relation of parent and child. 22 C. J., p. 399; *Haney v. Donnelly*, 12 Gray (Mass.) 361.

## CHAPTER XIX.

### CONFESSIONS

#### § 393. Defined.

"A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it." Wigmore on Ev., sec. 821. For a historical review, see Cornell Law Quarterly, February, 1925.

#### § 394. Confessions Distinguished from Admissions.

Although admissions are used chiefly in civil actions, nevertheless they are frequently employed in criminal prosecutions for the purpose of discrediting the defendant's case by bringing out inconsistencies between his claim of innocence and his prior statements or conduct. The distinction between admissions in criminal cases and confessions by the accused is the distinction in effect between admissions of fact from which the guilt of the accused may be inferred by the jury and the express admission of guilt itself.

#### § 395. Form of Confession.

The form of the confession is immaterial so long as it is in express words. Testimony of an oral confession is competent, even though it has been reduced to writing and signed by the accused, except where a confession is made upon a hearing before a magistrate, who reduces it to writing, as required by Code of Crim. Pro., sec. 198-200. The rules governing primary and secondary evidence have no application to a confession of a crime. In *People v. Giro*, 197 N. Y. 152, 90 N. E. 432, the Court says that a confession "may be in the form of a letter or of several letters to different persons, or may consist of detached conversations with many people, or it may be a formal confession, or all of these together, yet all are admissible for the prosecution, upon the principle that no one will voluntarily make an admission against himself unless it is true."

### § 396. Confession Must Be Voluntary.

The confession must be voluntary, and all confessions are such, except where the accused was under the influence of fear produced by threats or was promised immunity by the district attorney. The New York Code of Criminal Procedure, sec. 395, provides that: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made under a stipulation of the district attorney, that he shall not be prosecuted therefor; but it is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

"Private person," referred to in the statute, means any person not engaged in the conduct of a judicial proceeding. *People v. Rogers*, 192 N. Y. 331, 350, 85 N. E. 135. A confession, therefore, made to a sheriff, a police sergeant, or a district attorney is made to a "private person." *People v. White*, 176 N. Y. 331, 68 N. E. 630; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51; *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112, *Richardson's Cases in Evidence*, p. 682.

### § 397. Fear Produced by Threats.

Confessions induced by threats which are sufficient to put the accused in fear are deemed involuntary and are excluded on that ground. Code of Crim. Pro., sec. 395; *Miller v. People*, 39 Ill. 457. The practice of keeping a prisoner in a "sweat box," or dark, airless cell until a confession is wrung from him was condemned, and a confession so obtained excluded, in *Ammons v. State*, 80 Miss. 592, 32 So. 9, fully annotated 18 L. R. A. (N. S.) 768. A threat to prosecute the accused for perjury, unless he confessed, and to send him to the penitentiary for a longer period than would be possible for the burglary with which he was charged, was held sufficient to render a confession involuntary, in *Robertson v. State*, 81 Tex. Crim. Rep. 378, 195 S. W. 602, 6 A. L. R. 853. In order to exclude a confession on this ground, however, it must be shown that threats



were made which were sufficient to put the accused in actual fear. Mere advice that it would be better to tell the truth does not constitute such a threat. *People v. Randazzio*, 194 N. Y. 147, 155, 87 N. E. 112, *Richardson's Cases in Evidence*, p. 682. A persistent attempt, by means of questioning, to elicit a statement from the accused is not sufficient to exclude his confession. *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557, and authorities there cited. A confession may, however, be involuntary where it was obtained after many days of persistent questioning. *Wan v. United States*, 266 U. S. 1, 69 Law. Ed. 131, 45 Sup. Ct. Rep. 1. A threat, in order to vitiate a confession, need not come from a peace officer or other legal custodian of the accused. Fear produced by a mob or private person threatening violence, as well as fear produced by threats of officers of the law, will render a confession involuntary. 18 L. R. A. (N. S.) 832. If the authors of the threat have not the physical power or strength to carry the threat into execution, there is no reason for treating the threat as likely to produce an untrue confession. *Wigmore on Ev.*, sec. 828.

### § 398. Confessions Made While Under Arrest.

It is no ground for the exclusion of a confession that it was made by a prisoner while under arrest or to the officer in whose custody he was. *Murphy v. People*, 63 N. Y. 590; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *People v. Garfalo*, 207 N. Y. 141, 100 N. E. 698. Nor is failure to warn the accused that he is under no obligation to make any statement and that anything he says may be used against him any ground for excluding his confession. *People v. Randazzio*, 194 N. Y. 147, 158, 87 N. E. 112, *Richardson's Cases in Evidence*, p. 682. But when the accused is taken before a magistrate for a judicial hearing, he must be advised of his statutory rights.

### § 399. Promise of Immunity.

In most jurisdictions confessions are excluded as involuntary when it appears that they were induced by promises of

immunity made by persons of such authority or influence that the accused might reasonably consider them as persons able to afford him aid. *State v. Foster*, 25 N. M. 361, 183 Pac. 397, annotated 7 A. L. R. 417. But by statute in New York, the district attorney is the only person whose promise of immunity will render a confession inadmissible. Code of Crim. Pro., sec. 395; *People v. Chapman*, 224 N. Y. 463, 479, 121 N. E. 381. In *People v. Reilly*, 224 N. Y. 90, 120 N. E. 113, it appeared that the prison chaplain assured the accused, in the presence of an assistant district attorney, that there was no danger of any statement he might then make being used against him, and the court held the confession thus obtained inadmissible, on the ground that the assistant district attorney, by his silence, had adopted the statement of the chaplain and the legal effect thereof was precisely the same as if the statement had been made by the assistant district attorney. Where a confession has been induced by a promise of immunity made by a detective employed by the district attorney, it will not be excluded on this ground unless the promise of immunity was authorized by the district attorney or his assent to it can fairly be implied from the circumstances. *People v. Kurtz*, 42 Hun 335; *People v. Stielow*, 161 N. Y. S. 599.

#### § 400. Confession Obtained by Deception.

While the courts do not sanction deception as a means of extorting a confession, "nevertheless the law is well settled that the fact that a confession has been procured by deceptive practices is not sufficient to justify withholding it from the consideration of a jury nor will it operate to prevent them from basing a finding of guilty thereon if it is not open to any other objection and is corroborated as required by law." *People v. Buffom*, 214 N. Y. 53, 108 N. E. 184; *People v. White*, 176 N. Y. 331, 68 N. E. 630. In *People v. Scott*, 195 N. Y. 224, 88 N. E. 35, *Richardson's Cases in Evidence*, p. 703, the defendant's confession was obtained from him in the following manner: The witness, a neighbor of the defendant, went to the jail where he was confined,

and proposed that they should be handcuffed together and go to the woods where the deceased had been last seen alive, and if the defendant pointed out the place where the body was concealed, he should be released by the witness and allowed to escape. Defendant agreed to this and they went to the woods handcuffed together. On the way the witness drew from him further details of the crime, and on discovering the body, the defendant demanded his release, but he was taken back to the jail. The transaction was secretly aided by the sheriff, and was consented to by the district attorney. It was held that no error was committed by the trial court in receiving evidence of the confession.

**§ 401. Preliminary Ruling as to Competency of Confession.**

When a confession of the accused is offered by the prosecution, and the defendant objects to its admission, and offers to prove that it was procured under circumstances that render it inadmissible, it is the duty of the court to receive the evidence offered by the defendant before passing upon the competency of the confession. If no objection is made to its admission, or if there is no evidence on the question of its voluntariness, the presumption is that the confession is voluntary. Professor Wigmore says: "If there is any reason to object to the confession, no one can know it better than the defendant." Wigmore on Ev., sec. 860; *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135; *People v. Brasch*, 193 N. Y. 46, 85 N. E. 809; *People v. Nunziato*, 233 N. Y. 394, 135 N. E. 827.

Where there is no dispute as to the circumstances under which the confession was made, the trial judge may determine, as a matter of law, that it was voluntarily or involuntarily made. *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758.

The threat may either be expressed or implied. *People v. Pantano*, 239 N. Y. 416, 419, 146 N. E. 646. The court should reject the confession, if a verdict that it was made freely would be against the weight of the evidence. *People v. Doran*, 246 N. Y. 409, 159 N. E. 379. But, upon disputed

facts, the question of voluntariness is, under proper instruction of the court; for the jury. *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51; *People v. White*, 176 N. Y. 331, 350, 68 N. E. 630; *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112; *People v. Roach*, 215 N. Y. 592, 109 N. E. 618, *Richardson's Cases in Evidence*, p. 994; *People v. Doran*, *supra*. The preliminary examination of a witness for the purpose of ascertaining whether the confession was voluntarily made is a part of the evidence in the case, and should be taken in the presence of the jury. *People v. Randazzio*, *supra*.

#### § 402. Burden of Proof.

Since the burden of proof upon all of the issues in a criminal case rests upon the prosecution, the prosecution has the burden of proving that a confession was voluntarily made.

#### § 403. Reasons for Excluding Involuntary Confessions.

In the language of the Court, in *Commonwealth v. Morey*, 1 Gray (Mass.) 461, "The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted." Chief Justice Bartlett, writing for the Court of Appeals, in *People v. Buffom*, 214 N. Y. 53, 57, 108 N. E. 184, said: "The annals of criminal jurisprudence, however, abound in cases of false confessions induced by the hope of escape from punishment or the mitigation of punishment or of some other benefit to be gained by the confessing party. Indeed, there have been instances of false confessions for which it was impossible to assign any reasonable motive whatever." See, also, *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836.



**§ 404. Facts Discovered as Result of Involuntary Confession.**

The rule that excludes evidence of confessions made under circumstances that render them involuntary has never been applied so as to exclude evidence of facts which were ascertained as a result of the involuntary confession. Such facts are admissible, though the confession is inadmissible. To illustrate: The fact that stolen goods were found in the place indicated by the accused, is admissible, even though the confession was improperly obtained. *State v. Winston*, 116 N. C. 990, 21 S. E. 37; *Duffy v. People*, 26 N. Y. 588.

It would seem, as a matter of reason, that one of the important effects of verifying facts stated by the accused in his confession would be to corroborate the confession itself, and that a confession thus corroborated should be thereby rendered admissible in evidence. *Wigmore on Ev.*, sec. 858. The great weight of authority, however, supports the rule that involuntary confessions cannot be received in evidence, even though the facts stated therein are discovered, upon investigation, to be true. *Chamberlayne's Modern Law of Ev.*, sec. 1614. Where a fact has been proved, evidence that its discovery was the result of a statement made by the accused is competent. *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Duffy v. People*, *supra*.

It appears that the identity of the things found or discovered should be established by evidence other than the confession improperly obtained. Thus, evidence of the finding of a sack of money at the place designated by the accused, who, under threat of being delivered to a mob, confessed to having committed a murder and to having hidden a sack of money, taken from the body, at a certain place, is inadmissible, where neither money nor sack was identified as belonging to the murdered man. *Whitley v. State*, 78 Miss. 255, 28 So. 852. The things found were held to have been sufficiently identified, in *Jackson's case*, 1 N. Y. City Hall Rec. 28, and in *Done v. People*, 5 Park. Crim. Rep. (N. Y.) 364.



**§ 405. Classification of Confessions—Judicial and Extrajudicial.**

Confessions, like admissions, may be either judicial or extrajudicial. "Judicial confessions may be divided into two kinds—those made by way of plea of guilty, or otherwise, before a committing magistrate, and which form a part of the preliminary record upon which the case is sent to the grand jury for indictment; and those made by way of plea of guilty to an indictment or information when the accused is arraigned in the trial court." *Heim v. United States*, 46 Wash. Law Rep. (D. C.) 242. All other confessions are extrajudicial.

**§ 406. Plea of Guilty to an Indictment.**

A plea of guilty to an indictment, if accepted and entered of record, unless withdrawn with the consent of the court, is conclusive of the defendant's guilt. Upon such a plea there is nothing for the court to do but to pronounce sentence. Code of Crim. Pro., secs. 471 and 717; *People ex rel. Evans v. McEwen*, 67 How. Pr. (N. Y.) 105, 2 N. Y. Crim. Rep. 307. But, by statute in New York, no conviction shall be had upon a plea of guilty where the crime is or may be punishable by death. Code of Crim. Pro., sec. 332.

The authorities are divided as to whether a plea of guilty, which has been withdrawn with the permission of the court, is binding on the defendant. *Heim v. United States* 46 Wash. Law Rep. (D. C.) 242. In New York, however, when a plea of guilty has been withdrawn by the permission of the court, it remains in evidence, and this confession of guilt on the part of the accused has the same effect as though made out of court to a stranger or an officer. It is, of course, protected by the rules of evidence which usually surround confessions. *People v. Steinmetz*, 240 N. Y. 411, 148 N. E. 597.

**§ 407. Plea of Guilty or Confession before Committing Magistrate.**

A plea of guilty or confession by the accused, made dur-

ing the course of his examination before a committing magistrate, although technically a judicial confession, is of a lower grade than a plea of guilty to an indictment and is used for the same purposes as an extrajudicial confession. Such a plea or confession is not conclusive of the guilt of the accused and is insufficient, without corroboration, to support a judgment of conviction. *Heim v. United States*, 46 Wash. Law Rep. (D. C.) 242.

The Code of Criminal Procedure, sec. 196, provides that the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial. Sections 198 to 200 provide for the manner in which a defendant's statement must be taken and reduced to writing. If these statutory requirements are fully complied with an admission of guilt made in the course of the examination, which is shown to have been made voluntarily, is admissible against the accused upon his trial for the offense. *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 4 N. Y. Crim. Rep. 552, *Richardson's Cases in Evidence*, p. 689, and authorities there cited.

#### § 408. Confession Made at Coroner's Inquest.

In determining the extent to which the testimony of a defendant given at a coroner's inquest can be used against him upon his trial, it is necessary to consider the status of the accused at the time of his examination before the coroner. If he was in custody as the supposed criminal, he is regarded not as a mere witness but as a party accused; he is to be treated in the same manner as if brought before a committing magistrate, and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense. But if the defendant had not been arrested, charged with the crime, and was called merely as a witness, his testimony may be given in evidence against him, irrespective of the fact that he may have known at the time of giving the testimony that he was suspected of being

the criminal. If protection against self-incrimination is desired, he must claim his constitutional privilege. *People v. Mondon*, 103 N. Y. 211, 8 N. E. 469, 4 N. Y. Crim. Rep. 552, *Richardson's Cases in Evidence*, p. 689; *People v. Molineux*, 168 N. Y. 264, 330, 61 N. E. 286, 62 L. R. A. 193, *Richardson's Cases in Evidence*, p. 143.

The requirement that a confession must be voluntary in order to be admissible applies to a confession made in the course of an examination before a committing magistrate or coroner, as well as to extrajudicial confessions. *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500, *Richardson's Cases in Evidence*, p. 695.

#### § 409. Whole Confession Admissible.

The general rule is that, when a statement by the accused is offered as a confession, the whole of what the accused said at the time, in that connection, should be introduced in evidence. The prosecution is entitled to prove the entire statement, even though a part of it may tend to connect the accused with other crimes, where such admissions are inseparably connected with the confession of the crime charged. But if it is possible to prove the confession of the crime charged without proving the statements connecting the accused with other offenses, the latter should be excluded. *People v. Loomis*, 178 N. Y. 400, 70 N. E. 919. The accused is entitled to have the entire conversation admitted including any exculpatory or self-serving declarations contained therein. *Lowber v. State*, 6 Boyce (Del.) 353, 100 Atl. 322, annotated 2 A. L. R. 1014.

#### § 410. Right to Impeach Confession.

After a confession has been received in evidence, the defendant is entitled to impeach it in any way that he can. He may, for example, prove that facts stated in the alleged confession were untrue, for the purpose of raising an inference either that the alleged confession was not made or that it was not made voluntarily. *People v. Fox*, 50 Hun 604,

3 N. Y. S. 359, aff'd 121 N. Y. 449, 24 N. E. 923; *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325; *State v. Powell*, 258 Mo. 239, 167 S. W. 559. Or he may show that he was under the influence of drugs or liquor at the time of making the statements offered as a confession. *People v. Kent*, 41 Misc. 191, 83 N. Y. S. 948. The fact that the accused is not in full possession of his faculties at the time of his confession is not sufficient to render it involuntary. But such fact is a circumstance to be taken into consideration by the jury in weighing the evidence. It would seem unfair to take advantage of one confessing guilt at a time when he was not in full possession of his faculties; but, on the other hand, it is apparent that what the accused might say under such conditions might be more likely to be true than when made while in full possession of his reasoning powers, when he is in a situation coolly to calculate the consequences of making a statement which might endanger his liberty. *People v. Miller*, 135 Cal. 69, 67 Pac. 12; *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385.

In *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836, it appeared that, after a confession had been introduced, counsel for the defendant offered evidence to show that the defendant was a moron, with the mentality of a child of eight or nine, so that, in the event that he made the alleged confession, he was unable to understand what he was saying and his statements were controlled by the stronger minds of his interrogators working upon his weak mind. The Court of Appeals reversed the judgment of conviction, on the ground that the trial court committed error in excluding this evidence, which the jury was entitled to consider in determining what weight, if any, should be given to the defendant's confession.

The confession may be impeached by showing that the witness, to whom the confession was supposed to be made, is not a person to be believed by showing that the witness made statements before the grand jury contradictory to what he is now saying. *People v. Wilcox*, 245 N. Y. 404, 157 N. E. 509.



### § 411. Corroboration Required.

The Code of Criminal Procedure, sec. 395, provides that "A confession of a defendant, whether in the course of judicial proceedings or to a private person, . . . . is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." This means that there must be some other evidence of the *corpus delicti* besides the confession. It is only necessary to show, by some other evidence, that the crime charged has been committed by someone. It is not necessary to connect the defendant with the crime by means of other evidence. *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *People v. Roach*, 215 N. Y. 592, 109 N. E. 618, *Richardson's Cases in Evidence*, p. 994; *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836, concurring opinion of Mr. Justice Crane; *People v. Krauss*, 192 App. Div. 403, 182 N. Y. S. 715. Full, direct, and positive evidence of the *corpus delicti*, independent of the confession, is not required, however. It is sufficient to warrant a conviction if corroborating circumstances are shown which, when considered in connection with the confession, are sufficient to establish the defendant's guilt in the minds of the jury beyond a reasonable doubt. See authorities collated and discussed in *People v. Brasch*, 193 N. Y. 46, 85 N. E. 809.

### § 412. Confession by Person Not Charged With Crime.

The confession of a third person that he committed the crime for which the accused is on trial is hearsay, and is not admissible. *Donnelly v. United States*, 228 U. S. 243, 57 Law. Ed. 820, 33 Sup. Ct. Rep. 449, *Richardson's Cases in Evidence*, p. 706; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636. The prisoner may disprove his guilt by proving the guilt of some other person, but this cannot be done by proving the confession of the guilty party unless the guilty party is called as a witness for the defense.

### § 413. Value of Confessions as Evidence.

The courts have expressed many conflicting opinions as to the weight and probative value of confessions. Upon



close analysis, however, the authorities appear to be agreed that, as a general rule, confessions which are proved to have been made voluntarily constitute the highest and most satisfactory species of evidence, on the theory that no innocent man, in full possession of his faculties, can be supposed ordinarily to be willing to risk his life, liberty, or property voluntarily by a false confession, but that the evidence of the making of the confession and the circumstances under which it was made should be weighed with the greatest caution and suspicion. *People v. Bennett*, 37 N. Y. 117, 133; *People v. Sweeney*, 213 N. Y. 37, 49, 106 N. E. 913; *People v. Moyer*, 186 App. Div. 278, 282, 174 N. Y. S. 321; *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836.

**§ 414. Confessions through Interpreters.**

The fact that a confession is made through an interpreter does not render it inadmissible as hearsay provided the interpreter is called as a witness. *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112, *Richardson's Cases in Evidence*, p. 682.

## CHAPTER XX.

### SELF-SERVING DECLARATIONS

#### § 415. Defined.

A self-serving declaration is an oral or written statement made by a party to the action, or his agent, on some prior occasion, which is favorable to the claim of that party at the time of the trial. *People v. Epstein*, 245 N. Y. 234, 157 N. E. 121. However, a statement of deposits and withdrawals from the defendant's bank account which tends to substantiate the defendant's story is in no sense a self-serving declaration, but merely constitutes acts tending to prove or disprove the testimony of the defendant. *People v. Epstein, supra*.

#### § 416. Self-serving Declarations Inadmissible.

A party will not be allowed to create evidence for himself. Therefore, oral or written statements of a self-serving character by a party, or by one in privity with him, are inadmissible in evidence in his favor, unless they are clearly a part of the *res gestae*. To illustrate: A letter written by the defendants in which they stated that they had fully performed the contract upon which they based their counterclaim was excluded as a self-serving declaration. *Enoch Morgan's Sons' Co. v. Smith*, 132 N. Y. 591, 30 N. E. 749. A written report of an accident, made by defendant's motorman, was excluded as a self-serving declaration, in *Bloom v. Union Railway Co.*, 165 App. Div. 257, 150 N. Y. S. 779. See, also, *Brown v. Munn Piano Co.*, 172 App. Div. 372, 158 N. Y. S. 1026.

#### § 417. Self-serving Acts.

Upon the same principle, a party may not prove his self-serving acts in his own favor. To illustrate: A defaulting vendor may not introduce in evidence, as proof of the market value, the price at which he resold the property.

Latimer v. Burrows, 163 N. Y. 7, 57 N. E. 95; Groves v. Warren, 233 N. Y. 160, 135 N. E. 230.

**§ 418. Self-serving Declarations Admissible When Part of Res Gestae.**

It is error to exclude a statement or act which is clearly a part of the *res gestae*, on the ground that it is self-serving. To illustrate: In an action to regain possession of certain premises, the tenant claimed that the present owner had ratified the lease given by the former life tenant by accepting the rent reserved in said lease. The trial court refused to receive in evidence a notice sent to the tenant by the present owner at the time of receiving the rent, in which he stated that he would accept the rent from month to month only, on the ground that this notice was a self-serving declaration. Mr. Justice Kelby, writing for the Appellate Term of the Supreme Court, pointed out that the exclusion of this notice was error, as the evidence was competent to prove the contract between the parties. *Tunick v. Federal Food Stores, Inc.*, 117 Misc. 329, 191 N. Y. S. 174.

**§ 419. Self-Serving Declarations Received as Admissions When Acquiesced in by Opponent.**

Self-serving declarations may, of course, be received as admissions when it is clearly shown that they were acquiesced in by the party against whom they are offered. But the acquiescence must be expressed or clearly implied from the facts. *Israel v. Savoy Watch Co., Inc.*, 192 N. Y. S. 333. An unanswered letter is a self-serving declaration and is not competent evidence against the party to whom it was written. *Steber v. Palm Knitting Co.*, 201 N. Y. S. 478.

## CHAPTER XXI.

### PAROL EVIDENCE RULE

#### § 420. Parol Evidence Rule Defined.

All prior negotiations between the parties to a written contract are superseded by and merged in the written instrument itself, when finally executed, and, therefore, evidence of talk or negotiations between the parties to a complete, valid written instrument, either prior to or at the time of its execution, is inadmissible to contradict, vary, add to, or subtract from its terms. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Richardson's Cases in Evidence*, p. 710; *Traders National Bank v. Laskin*, 207 App. Div. 18, 201 N. Y. S. 728; Editorial, *New York Law Journal*, May 4, 1928.

A more comprehensive definition is stated by Mr. Stephens, as follows: "When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to, or varied by parol evidence." *Chase's Stephen's Digest*, p. 219; *Ruppert v. Singhi*, 243 N. Y. 156, 153 N. E. 33.

#### § 421. Illustrations.

A written contract cannot be modified by parol evidence to show that the acceptor of a draft should not be called upon to pay, *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; that an indorsement on a note in blank was agreed to be without recourse, *Martin v. Cole*, 104 U. S. 30, 26 Law.

Ed. 647; that a certificate of deposit should bear interest, *Reed v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250; that goods might be delivered in parcels and payment made as each parcel was delivered, where the agreement was to deliver the entire quantity before payment was to be made, *Baker v. Higgins*, 21 N. Y. 397; that an unconditional contract of sale was intended as a bailment, *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820; that the lessor stated that the tenant might occupy the building, rent free, until it was torn down, *Kaven v. Chrystie*, 84 N. Y. S. 470; that the maker of a note need only pay a certain sum weekly, so long as he remained in business and purchased beer of the payee, *Munch Brewery v. De Matteis*, 128 App. Div. 830, 112 N. Y. S. 1042; that the defendant agreed to build a log slide for the purpose of delivering certain logs at plaintiff's mill, where the written agreement was simply to deliver the logs "so as to be as convenient and accessible for putting into the mill as the situation and circumstances will permit," *Mead v. Dunlevie*, 174 N. Y. 108, 66 N. E. 658.

The numerous exceptions and qualifications which limit the application of the rule will appear in the discussion that follows. Our consideration will be confined to documentary obligations arising out of contracts which the parties designed should be the repository of their final intentions.

#### § 422. Reason of Rule.

The rule is based upon an assumed intention of the parties, evidenced by a written contract, to place themselves beyond the uncertainties of oral testimony, and the courts are not disposed to defeat this presumed intention of the parties. The instrument itself is the thing to be dealt with, and it must be considered in the form in which it is found, and be held valid or invalid, operative or inoperative. The rule is a protection against fraud and perjury, infirmity of memory, and the death of witnesses. *Thomas v. Scutt*, 127 N. Y. 133, 142, 27 N. E. 961, *Richardson's Cases in Evidence*, p. 710; *Lese v. Lamprecht*, 196 N. Y. 32, 36, 80 N. E. 365, *Richardson's Cases in Evidence*, p. 715. For a scholarly



discussion of the parol evidence rule and cases collated, see Editorial, *New York Law Journal*, October 20, 1926.

**§ 423. Legal Implications Cannot be Contradicted.**

Legal implications arising from the use of certain terms are within the protection of the rule and can no more be varied by oral testimony than if the implications were expressed in writing. To illustrate: The legal presumption that a contract, not within the Statute of Frauds, silent as to the time of performance, is to be performed within a reasonable time cannot be varied by oral testimony tending to fix a definite time, because this would vary the contract. *Stange v. Wilson*, 17 Mich. 342, *Richardson's Cases in Evidence*, p. 718; *Morowsky v. Rohrig*, 4 Misc. 167, 23 N. Y. S. 880. The implied contract arising from a blank indorsement cannot be modified by parol evidence. *Hawkins v. Shields*, 100 Miss. 739, 57 So. 4, fully annotated 4 A. L. R. 760; *Washington Savings Bank v. Ferguson*, 43 App. Div. 74, 59 N. Y. S. 295. An obligation for the payment of money cannot be varied by parol evidence to show that it was payable in a certain kind of money, or out of a particular fund, or in services of merchandise. For example, an oral agreement that a note was to be paid in carriage hire was held inadmissible. *Zinsser v. Columbia Cab Co.*, 66 App. Div. 514, 73 N. Y. S. 287, *Richardson's Cases in Evidence*, p. 720. Where a complete written contract for the sale of goods contains no provision as to quality, the law implies an agreement to deliver a merchantable quality, and parol evidence is inadmissible to show that the goods were sold by sample. *Standard Milling Co. v. de Pass*, 154 App. Div. 525, 139 N. Y. S. 611, *aff'd* 214 N. Y. 638, 108 N. E. 1108. Where a written contract for the performance of certain work does not specify the time of payment, the law implies an agreement that payment shall be made upon the completion of the work, and the contract may not be varied by evidence of an oral agreement specifying a different time of payment. *Delehanty v. Dunn*, 151 App. Div. 695, 136 N. Y. S. 193.

The legal implication created by the Negotiable Instruments Law, sec. 118, is only *prima facie*. By it, indorsers are presumptively liable in the order in which they indorse, but evidence is admissible to show that among themselves some other agreement was made. *Witteman v. Sands*, 238 N. Y. 434, 144 N. E. 671.

**§ 424. Legal Implications in Contract Within the Statute of Frauds.**

The requirement of the Statute of Frauds is that the memorandum contain all the terms of the contract agreed upon by the parties. If the memorandum contains no time of delivery and none has been agreed upon by the parties, the memorandum will be completed by the legal implication that a reasonable time was intended. If, however, the parties have actually agreed upon the time of delivery, the time must be expressed in the memorandum otherwise the memorandum will be insufficient to satisfy the statute. *Berman Stores Co., Inc. v. Hirsh*, 240 N. Y. 209, 148 N. E. 212. The memorandum must not only express the terms of a contract but must completely evidence the contract which the parties made. *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619.

**§ 425. Exceptions to Parol Evidence Rule.**

There are two exceptions to the general rule that evidence of what was said between the parties to a written instrument, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. The first embraces those cases in which the validity of the instrument is attacked on the ground that the writing, although purporting to be a contract, is, in fact, no contract at all, because it never had any valid legal inception. The second exception includes those cases which recognize the writing as valid but incomplete, and admits parol evidence, not to vary, but to complete the contract, the writing being only a part of it. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, *Richardson's Cases in Evidence*, p. 710.

**§ 426. First Exception: Non-Contractual Relation.**

Extrinsic evidence is admissible to show that what appears to be a contract is not, in fact, a valid agreement. The evidence, in such cases, is used, not to vary or contradict an existing contract, but to show that no binding obligation ever existed. *Grierson v. Mason*, 60 N. Y. 394, *Richardson's Cases in Evidence*, p. 723. Upon the same principle, parol evidence is admissible for the purpose of sustaining a contract which is attacked on the ground that it had no valid legal inception. Thus, parol evidence may be received either to establish or disprove the validity of an agreement which is attacked on the ground of

1. A want of consideration.
2. A want of genuineness of consent, by reason of fraud, mistake, duress, or undue influence.
3. Illegality of subject matter or consideration.
4. Material alteration.
5. Conditional delivery.

**§ 427. Parol Evidence as to Consideration.**

In all cases in which a want of consideration is available as a defense, that is, in all cases except actions upon negotiable instruments in the hands of holders in due course or executed instruments under seal, parol evidence is admissible to show that an apparently valid obligation in writing was given without consideration to support it. *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32, *Richardson's Cases in Evidence*, p. 725. Similarly, parol evidence is admissible to prove that there was a valid consideration for the note or other written obligation in question. *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325.

Where the receipt of a certain consideration is acknowledged in a deed, mortgage, bill of sale, note, or other written obligation, parol evidence is admissible to prove the true consideration and to show that it was different from the consideration expressed in the writing. *McKinster v. Babcock*, 26 N. Y. 378; *Hocking Valley Ry. Co. v. Barbour*,

190 App. Div. 341, 179 N. Y. 810; *Re Edmundson*, 259 Pa. 429, 103 Atl. 277, 2 A. L. R. 1150. But where a contract which is executory as to both parties is reduced to writing, the consideration expressed in the writing can no more be varied by extrinsic evidence than can any other term of the contract. *Emmett v. Penoyer*, 151 N. Y. 564, 45 N. E. 1041; *Sturmdorf v. Saunders*, 117 App. Div. 762, 102 N. Y. S. 1042, *aff'd* 190 N. Y. 555, 83 N. E. 1132; *Huskisson v. Lipp*, 98 Misc. 1, 162 N. Y. S. 206. The distinction is expressed by the Court, in *Sturmdorf v. Saunders*, *supra*, as follows: "Whenever a recital of consideration in an instrument is merely the evidence of a fact it is subject to explanation, but when it is a substantive part of the contract, embraced within the covenant of one of the parties, it cannot be thus contradicted." For a review of authorities illustrating the distinction between the statement of the consideration in a written instrument by way of recital merely and the expression of the consideration as a contractual element, see 12 A. L. R. 354, note.

**§ 428. Parol Evidence as to Fraud, Mistake, Duress, and Undue Influence.**

Parol evidence is always admissible to prove that an apparently valid contract in writing is unenforceable by reason of the fact that the consent of one of the parties was obtained by fraud, mistake, duress, or undue influence. Thus, where a husband gets the signature of his wife to a bond and mortgage upon the representation that she is merely signing as a witness, parol evidence is admissible to show the true facts. The mortgage is a forgery. *Blum v. Hoffkins*, 210 App. Div. 748, 206 N. Y. S. 587; *Prentiss v. Russ*, 16 Me. 30; *Whipple v. Brown Bros. Co.*, 225 N. Y. 237, 121 N. E. 748; *Benedict Co., Inc. v. McKeage*, 201 App. Div. 161, 195 N. Y. S. 228; 22 C. J., pp. 1214 and 1228. Similarly, parol evidence is admissible to disprove allegations of fraud, mistake, etc. *Duffy v. Meyer*, 122 App. Div. 838, 107 N. Y. S. 672. In actions for reformation of written instruments or other relief based on a claim of mutual mis-

take in reducing an agreement to writing, parol evidence is admissible to show what the true contract was. *Meyer v. Lathrop*, 73 N. Y. 315; *Schall v. Schwartz & Co., Inc.*, 177 App. Div. 765, 165 N. Y. S. 35.

**§ 429. Parol Evidence as to Legality of Subject Matter or Consideration.**

Parol evidence is admissible to show that a written contract, legal upon its face, is, in fact, forbidden by law. Illustrations: An action for rent due upon a lease may be defeated by parol evidence showing that it was understood by both parties that the premises were to be used as a house of ill fame. *Plath v. Kline*, 18 App. Div. 240, 45 N. Y. S. 951. In an action upon a written contract for the payment of money loaned, parol evidence was admitted to show that a clause providing for extra compensation for services to be performed in connection with collecting certain book accounts, in addition to the legal rate of interest upon the loan, was inserted as a means of evading the usury law. *Houghton v. Burden*, 228 U. S. 161, 57 Law. Ed. 780, 33 Sup. Ct. Rep. 491. In an action upon a written agreement for commissions for procuring a government contract, it was held error to exclude evidence of conversations preceding the written agreement, tending to show that the written agreement was to be performed in an illegal way by the use of corrupt means and improper influences. *McCraith v. Buss*, 198 App. Div. 524, 190 N. Y. S. 597.

**§ 430. Parol Evidence as to Material Alterations.**

Parol evidence is admissible to show that a written instrument fails to express the true agreement of the parties by reason of the fact that it has been materially altered. *Booth v. Powers*, 56 N. Y. 22. Parol evidence is admissible, also, to explain an alteration in a written instrument and to show that it was made under such circumstances as not to vitiate the instrument. 22 C. J., p. 1147. Oral proof is always allowed to explain changes made in a will before the



execution thereof. *Matter of Bissonnette*, 127 Misc. 215, 216 N. Y. S. 325.

**§ 431. Parol Evidence to Show Conditional Delivery of Contract.**

Parol evidence is admissible to show that a contract, other than a deed, in form complete, was not to become binding until the performance of a condition precedent resting in parol. Thus, parol evidence that a contract for the sale of merchandise was executed and delivered on condition that the reports of a commercial agency, as to buyer's responsibility, should be satisfactory, is admissible. *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127. Such evidence is received not to contradict or vary the written contract but to show that it never became operative. *Wilson v. Powers*, 131 Mass. 539; *Vincent v. Russell*, 101 Or. 672, 201 Pac. 433, fully annotated 20 A. L. R. 417; *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985; *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105, *Richardson's Cases in Evidence*, p. 727; *Siegel v. Schwarzschild*, 197 App. Div. 751, 189 N. Y. S. 556. In *Smith v. Dotterweich*, *supra*, parol evidence was held admissible to show that a note, given in payment of a life insurance premium, was delivered upon the condition that it was not to take effect as a valid obligation unless the maker should be furnished with a loan upon the security of the policy. But where a complete contract in writing is delivered unconditionally, parol evidence is inadmissible to show an oral agreement that the contract was to be canceled in a certain future contingency. *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 64 N. E. 952, *Richardson's Cases in Evidence*, p. 729; *Smith v. Hedges*, 170 App. Div. 349, 155 N. Y. S. 934, *aff'd* 222 N. Y. 701, 119 N. E. 1077. In *Jamestown Business College Assn. v. Allen*, *supra*, it was held that one who has given a note in payment of tuition cannot show an oral agreement that the note was not to be paid in case the maker should decide not to take the course of instruction. And, where a note is given in payment for labor and materials to be furnished, the maker

cannot show an oral agreement that the note was to be canceled in case the contract was not completed when the note fell due. *Smith v. Hedges*, *supra*. The distinction between these two lines of cases is clear and easy to define. Whenever a written instrument is delivered manually under an oral agreement that it is not to take effect as a binding obligation except upon the happening of a condition precedent, such oral agreement may be given in evidence for the purpose of showing that no contract ever existed between the parties; but when a written contract is delivered as a present, binding obligation, with the understanding that it may be canceled upon the happening of a condition subsequent, such oral agreement may not be given in evidence, because it would vary the terms of the written contract. The difficulty lies in determining, from the language employed by the parties, which of these conditions was intended in a given case.

The rule that a delivery may be shown to have been conditional applies to a negotiable instrument in the hands of the payee or any holder other than a holder in due course. *Neg. Inst. Law*, sec. 35; *Grannis v. Stevens*, 216 N. Y. 583, 111 N. E. 263.

Parol evidence is admissible to show that a release under seal was delivered upon a condition precedent. *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692. But it is well settled in New York that a deed conveying an interest in real property cannot be delivered to the grantee upon an oral condition, and parol evidence that there was such an oral condition attached to the delivery is inadmissible. *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805; *Buszozak v. Wolo*, 211 N. Y. S. 557, 125 Misc. 546.

### § 432. Second Exception: Incomplete Writings.

Where the writing covers only a part of an oral and entire contract, the unwritten part may be shown by parol. *Cooper v. Payne*, 186 N. Y. 334, 78 N. E. 1076; *Di Menna v. Cooper & Evans Co.*, 220 N. Y. 391, 397, 115 N. E. 993. This rests upon the theory that the parties did not intend

that the writing should contain all the terms agreed upon. In *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, *Richardson's Cases in Evidence*, p. 710, the Court said, at p. 138: "The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete either obviously, or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. Two things, however, are essential to bring a case within this class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case, it is conclusively presumed to embrace the entire contract. 2. The parol contract must be consistent with and not contradictory of the written instrument." It is, at times, exceedingly difficult to determine just when a written instrument is incomplete. Earlier decisions have held, for instance, that the incompleteness need not appear on the face of the writing, but that much depends upon circumstances. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512, *Richardson's Cases in Evidence*, p. 738. Recent decisions, however, show an increasing tendency to enforce the parol evidence rule strictly in all cases which do not fall clearly within one of the recognized exceptions. Whenever, therefore, a written instrument appears, upon its face, to embrace all of the terms of a valid contract, the courts of this State are now disposed to exclude all extrinsic evidence tending to show an additional term of the contract which might have been, but was not, included in the writing. *Edison El. Ill. Co. v. Thacher*, 229 N. Y. 172, 128 N. E. 124; *Interstate Chemical Corp. v. Duke*, 176 App. Div. 684, 163 N. Y. S. 1035, aff'd 226 N. Y. 610, 123 N. E. 871. In *Loomis v. N. Y. C. & H. R. R. Co.*, 203 N. Y. 359, 96 N. E. 748, *Richardson's Cases in Evidence*, p. 732, the Court of Appeals went so far as to hold that, in a written contract to transport goods, a blank space left for the route could not be supplied by parol evidence to show that before the contract was

signed the shipper instructed the carrier to ship by a particular route. The Court based its decision upon the ground that "the unfilled blanks were incidental merely and not essential to a perfect agreement for the transportation of merchandise," and that "the effect of not specifying the route was simply to leave that subject open to the choice of the carrier, which could select any route that it chose."

Parol evidence is, of course, inadmissible to supply any of the terms of a contract which is required by the Statute of Frauds to be in writing. *Evans v. Pelta*, 146 App. Div. 749, 131 N. Y. S. 411; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959; *Brauer v. Oceanic Steam Navigation Co.*, 178 N. Y. 339, 70 N. E. 863.

### § 433. Sale of Personal Property—Express Warranty.

Written contracts for the sale of personal property, which are manifestly complete, are fully protected by the parol evidence rule. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, *Richardson's Cases in Evidence*, p. 710. But where the contract of sale is silent as to a warranty, the question arises whether an express oral warranty may be shown. The rule laid down is that parol evidence is admissible when the alleged parol warranty relates to a future condition, capacity, or quality, but is not admissible where it relates to the present condition of the subject matter. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512, *Richardson's Cases in Evidence*, p. 738; *Eighmie v. Taylor*, 98 N. Y. 288, *Richardson's Cases in Evidence*, p. 742; *Cohan v. Markel*, 215 App. Div. 435, 213 N. Y. S. 681.

In *Chapin v. Dobson*, *supra*, the action was brought upon an apparently complete written contract for the sale of certain machinery and the defendant was permitted to prove an oral guaranty that the machines would do the defendant's work well and satisfactorily, or, in case of failure, that they would be taken back and should not be paid for. In *Eighmie v. Taylor*, *supra*, the action was brought to recover damages for breach of an oral warranty, made at the time of executing a deed transferring certain oil wells and fix-



tures, to the effect that the wells were then yielding sixteen barrels of oil a day. In holding evidence of this alleged warranty inadmissible, the Court said, at p. 299: "It is obvious at a glance that the covenants related to the then present quality or condition of the thing sold, and not to contingencies or results to arise after the execution of the contract and in the future. If the warranty had been that the wells on the leased land would continue for a fixed period to yield as much oil as they were then yielding, the agreement would have been much nearer those which have been referred to." *Chapin v. Dobson, supra*.

The courts have never expressly repudiated the distinction laid down in *Chapin v. Dobson* and *Eighmie v. Taylor, supra*, but it is clear, from the trend of modern decisions, that their policy is to exclude, wherever possible, evidence of any claimed oral warranties to add to the terms of a written contract which is complete on its face. To illustrate: Where a bill of sale specified a twenty-five horse power automobile, the buyer was not permitted to prove an oral warranty on the part of the seller that the car would develop thirty-five horse power. *Colt v. Demarest & Co.*, 159 App. Div. 394, 144 N. Y. S. 557. See, also, *Eastman v. Britton*, 175 App. Div. 476, 162 N. Y. S. 587; *Wheaton Roller Mill Co. v. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854.

#### § 434. Memorandum.

A mere memorandum, not intended to express the terms of a contract, will not shut out parol evidence to complete the agreement. The memorandum is not presumed to contain the whole agreement. *Thomas v. Nelson*, 69 N. Y. 118; *Hechinger v. Ulacia*, 194 App. Div. 330, 185 N. Y. S. 323; *Davidge v. Velie*, 95 Misc. 511, 160 N. Y. S. 820. Thus, an order for goods, or a writing acknowledging the receipt of an order for goods, stating the articles, the price, the delivery, and the terms of sale, does not preclude evidence of a warranty as to quality. *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51; *Anderson Trading Co., Ltd. v. Brody*, 193 App.



Div. 681, 184 N. Y. S. 383. So, too, where a writing executed upon the sale of a drug store, contained at its end "\$2500.", but was silent as to what such figures meant, it was held competent for the seller, suing for the consideration, to prove that the consideration of the sale was that the buyer should surrender \$2500 of the seller's notes and pay in addition \$1000, if he resold the property. *Emmett v. Penoyer*, 151 N. Y. 564, 45 N. E. 1041.

### § 435. Receipts.

A receipt is merely a unilateral admission and is open to explanation or correction by showing that it was obtained by fraud, or was given under mistake, or that the money receipted for was not actually paid. The full facts and circumstances attending its issuance may be shown, even though they contradict and vary the writing. *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113, *Richardson's Cases in Evidence*, p. 748; *Seeley v. Osborne*, 220 N. Y. 416, 116 N. E. 97. But a receipt or release under seal is deemed conclusive evidence of a sufficient consideration, and, therefore, such an instrument may not be contradicted by parol evidence to show that any part of the money receipted for was not paid. *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692; *Hogan v. Producers' Development Co.*, 200 App. Div. 29, 192 N. Y. S. 337.

### § 436. Bill of Lading.

A bill of lading is both a receipt and a contract. It is a receipt as to quantity, quality, condition, marks, and numbers, and a contract for transportation, delivery, and freight charges. Thus, oral evidence is competent to contradict a recital in a bill of lading that goods were received in good order, and also to show that an address on a package is different from that stated in the shipper's receipt, even though the receipt contains the shipping contract. *Cappel v. Weir*, 46 Misc. 441, 92 N. Y. S. 365. But the shipping receipt or bill of lading is also the contract of carriage, and all prior negotiations and oral agreements between the

parties are conclusively presumed to be merged therein. Parol evidence cannot be received, therefore, to contradict the shipping receipt by showing that the parties orally agreed upon a different freight rate, a different route, a different mode of transportation or a different valuation agreement from that expressed or implied in the contract. *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; *White v. Ashton*, 51 N. Y. 280; *Hinckley v. N. Y. C. & H. R. R. R. Co.*, 56 N. Y. 429; *Cohen v. Morris European & Am. Express Co., Ltd.*, 151 App. Div. 672, 136 N. Y. S. 489, and authorities there cited.

**§ 437. Parol Evidence to Show Collateral Oral Agreements.**

An independent collateral oral agreement, made before or at the time of the written contract, may be shown, even though it relates to the same subject, provided it does not vary or contradict the writing. The difficulty lies in determining whether the agreement sought to be established is collateral. The first test is whether the alleged collateral agreement rests upon a separate consideration to support it. If it rests upon a separate consideration it is an independent contract, which may be proved by parol. If it does not, it is merely an additional term of the contract in writing, which may not be proved by parol. The consideration for the independent collateral contract may, however, be an agreement to enter into the written contract. To illustrate: An agreement to construct a storehouse of sufficient capacity and strength to hold three carloads of slate, in consideration of the defendant's agreement to take a two years' lease of said storehouse at an agreed rental, is collateral to the written lease, when executed, and may be proved by parol. *Brown v. DeGraff*, 183 App. Div. 177, 170 N. Y. S. 445. See, also, *Hutzler v. Richter*, 13 App. Div. 592, 43 N. Y. S. 679; *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Stark Electric Ry. Co. v. McGinty Contracting Co.*, 238 Fed. 657. But where the alleged collateral agreement is merely an additional term of the contract, it may not be shown by parol.

To illustrate: An oral agreement by the vendor of a second-hand automobile to keep the car in repair for one year was held inadmissible to vary a written contract of sale on the ground that "it was not a mere inducement for entering into the sale, that it was a part of the bargain of sale, and was not independent of, or collateral to, that sale." *MacAlman v. Gleason*, 228 Mass. 454, 117 N. E. 795.

Under this limitation the New York courts uniformly hold that oral agreements between landlord and tenant whereby the former agrees to make repairs, etc., cannot be shown, where the lease appears, upon its face, to be complete, because, to do so, would violate the rule that, at the time the written contract is executed, all prior and contemporaneous agreements are deemed to have been merged therein. *Van Derhoef v. Hartmann*, 63 App. Div. 419, 71 N. Y. S. 552; *Smith v. Smull*, 69 App. Div. 452, 74 N. Y. S. 1061; *Daly v. Piza*, 105 App. Div. 496, 94 N. Y. S. 154, *Richardson's Cases in Evidence*, p. 756; *Eisert v. Adelson*, 136 App. Div. 741, 121 N. Y. S. 446.

The weight of authority holds that a promise on the part of a vendor of a certain business that he will not engage in a similar business in the same locality for a stated period forms a part of the consideration for the sale and, therefore, that such a stipulation, if made orally, may not be proved, where the contract of sale is in writing. *Wilson v. Sherburne*, 6 Cush. (Mass.) 68; *Costello v. Eddy*, 34 N. Y. St. Rep. 565, 12 N. Y. S. 236, *aff'd* 128 N. Y. 650, 29 N. E. 146; *Love v. Hamel*, 59 App. Div. 360, 69 N. Y. S. 251.

In the recent case of *Mitchill v. Lath*, 247 N. Y. 377, 160 N. E. 646, the plaintiff and defendants had entered into a contract containing definite provisions as to the obligations of the parties. In a suit brought to compel specific performance, a collateral oral agreement by which the defendants promised to remove an ice house owned by them and situated across the road from the property sold, was held to be so closely related to the subject dealt with in the written agreement that proof thereof would violate the parol evidence rule. Summarizing the circumstances under which

a collateral oral agreement may be received, the Court in this case made the following classification: (1) the agreement must be collateral in form; (2) it must not contradict express or implied provisions of the written contract; (3) it must be an agreement that the parties would not ordinarily be expected to embody in the writing. Editorial, *New York Law Journal*, May 11, 1928.

### **§ 438. Parol Evidence Affecting Date of Instrument.**

The date of a writing may be supplied by oral evidence. So, too, the date, other than that which appears on the face of the writing, may be shown as the true date on which the contract was signed and delivered. In *Draper v. Snow*, 20 N. Y. 331, 333, the Court said: "Whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol; not merely to supply an omission, where the paper itself is without date, but in opposition to the date, where it contains one. The time when a contract is executed is no more a part of the contract than the place where it is executed. Both belong to that class of attending and surrounding circumstances which may always be resorted to for assistance in explaining and applying the terms of the contract." See, also, *Kincaid v. Archibald*, 73 N. Y. 189.

### **§ 439. Parol Proof of Subsequent Agreements. Simple Contracts.**

The parol evidence rule is not "infringed by the admission of oral evidence to prove a new and distinct agreement, upon a new consideration, whether it be as a substitute for the old, or in addition to and beyond it." *Greenleaf on Ev.*, 16th Ed., sec. 303. The rule does not, therefore, exclude evidence of a subsequent modification or discharge of a writing. To illustrate: . In an action for rent due under a lease, it was held error to exclude evidence offered by the tenant to show that, subsequent to the execution of the lease, the landlord agreed to reduce the rent in consideration of the



tenant's promise to make certain improvements and to cause a tenement house violation, which had been filed against the premises, to be removed. *Haight v. Cohen*, 123 App. Div. 707, 108 N. Y. S. 502. A subsequent agreement to pay demurrage for unreasonably detaining a chartered vessel was held to be an entirely new contract and not an attempt to vary the original charter-party agreement by parol evidence. *Clyde v. Wood*, 189 App. Div. 737, 179 N. Y. S. 252. An oral agreement to extend the time of payment or of performance of the contract may always be shown. *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92. In *Homer v. Guardian Mut. Life Ins. Co.*, 67 N. Y. 478, the Court says: "The time for the performance of contracts by specialty, as well as simple contracts, may be extended by parol, and when so extended it is as if the extended time was written in and made a part of the original contract, every other provision remaining intact, and to be carried out with the single modification as to time." Even though the written contract provides that no modification shall be binding unless in writing, it may, by consent of the parties, be orally modified. *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369, 70 N. E. 928. But it must clearly appear that the agreement in question was made subsequent to the written contract; otherwise it will be presumed to be merged in the writing. *Brewster v. Countryman*, 12 Wend. (N. Y.) 446.

The only requirement for the validity of a parol modification of a written contract is consideration. Mutual promises to do certain things or to give up rights secured by the original contract substitute a sufficient consideration. *McIntosh v. Miner* 37 App. Div. 483, 55 N. Y. S. 1074; *American Exchange Nat. Bank v. Smith*, 61 Misc. 49, 113 N. Y. S. 236; *Clyde v. Wood*, *supra*. A subsequent oral promise to waive performance at the time specified in the contract, which has been acted upon by the other party, may be shown, even though there is no consideration for the extension of time, on the theory of an estoppel. *Homer v. Guardian Mut. Life Ins. Co.*, *supra*; *Thomson v. Poor*, 147 N. Y. 402, 409, 42 N. E. 13; *Arnot v. Union Salt Co.*, 186



N. Y. 501, 511, 779 N. E. 719. But a bare promise to reduce the rent, made by a landlord subsequent to the execution of the lease, would be void for want of consideration. *Coe v. Hobby*, 72 N. Y. 141, 149, 28 Am. Rep. 120.

**§ 440. Subsequent Parol Agreements Affecting Contracts Under Seal.**

The old common law rule held that a contract under seal could not be modified or discharged by a subsequent agreement which was not under seal. It is well settled in New York, however, that an executed parol modification of a sealed contract is valid and may be shown by oral testimony, although it is still the rule that a sealed contract cannot be modified by a parol unexecuted contract. *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198. To illustrate: A lease for five years provides for an annual rental of \$4500. After one year an oral agreement is entered into between landlord and tenant providing for an annual rental of \$3500. This sum is paid for a period of two years. Evidence of the parol executed agreement is admissible in an action by the landlord to recover the difference between what was paid under the oral agreement and the amount reserved in the lease. But parol evidence is inadmissible in an action for rent for the remaining period of two years, for, as to this period, the oral agreement is unexecuted and cannot, therefore, be shown to modify the sealed instrument. *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, *Richardson's Cases in Evidence*, p. 758. In *Harris v. Shorall*, 230 N. Y. 343, 130 N. E. 572, *Richardson's Cases in Evidence*, p. 761, the Court of Appeals went one step further and held that a subsequent parol modification of a sealed contract which has been executed by one of the parties but remains executory as to the other party is valid and enforceable. The rule that a contract under seal cannot be modified by a subsequent oral agreement has recently been approved by the Court of Appeals. *Commack v. Slattery Bros.*, 241 N. Y. 39, 148 N. E. 781; *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374.

**§ 441. Modification of Contracts Within the Statute of Frauds.**

A contract within the Statute of Frauds may not be modified by a subsequent oral agreement. *Hill v. Blake*, 97 N. Y. 216; *Maddaloni Olive Oil Co. v. Aquino*, 191 App. Div. 51, 180 N. Y. S. 724; *Schaap v. Wolf*, 173 Wis. 351, 181 N. W. 214, fully annotated 17 A. L. R. 7. To illustrate: In an action for breach of a contract for the purchase of three hundred barrels of wine upon sixty days' credit, the defendant offered to prove a subsequent oral modification of the original written contract providing for cash payment upon delivery. This evidence was excluded on the ground that a contract within the Statute of Frauds could not be altered by parol. *Maddaloni Olive Oil Co. v. Aquino*, *supra*.

There are two limitations to the rule that contracts within the Statute of Frauds cannot be modified by a subsequent oral agreement. The first is where the modification takes the form of a substituted contract which itself does not fall within the statute. *Lieberman v. Templar Motor Car Co.*, 236 N. Y. 139, 140 N. E. 222. The second is where the oral modification of a contract within the Statute of Frauds has been acted upon by one of the parties to his disadvantage either on the theory of estoppel or on the theory that the courts will not allow the Statute of Frauds to be used as an instrument of fraud. *Imperator Realty Co. v. Tull*, 228 N. Y. 447, 127 N. E. 263, *Richardson's Cases in Evidence*, p. 765; *Hecht v. Marsh*, 105 Neb. 502, 181 N. W. 135, 17 A. L. R. 1, annotated p. 39.

There is no ground, however, for rejecting parol evidence of a total rescission or abandonment of a contract within the Statute of Frauds, and such evidence is generally conceded to be admissible. *Maddaloni Olive Oil Co. v. Aquino*, *supra*, and authorities there cited.

**PAROL EVIDENCE TO AID INTERPRETATION****§ 442. Proof of Meaning of Words.**

If the language of the writing is such that the court does not understand it, oral evidence is admissible to explain its

meaning. To illustrate: In an action upon a written contract for the sale of "3000 Lbs.—Amacid Blue Black KN.," the Court said: "In order to avoid any possible misunderstanding upon the trial, it may be well to point out that either party will be at liberty, by parol, to define the term 'Amacid Blue Black KN.' When a term of a written contract requires definition in order to make its meaning clear, and such definition is not found in the writing itself, it is always permissible to give that definition by extrinsic evidence. Such evidence does not vary the meaning of the writing but on the contrary discloses its full significance." *American Aniline Products, Inc. v. Mitsui & Co., Ltd.*, 190 App. Div. 485, 179 N. Y. S. 895, *Richardson's Cases in Evidence*, p. 771.

The meaning of words or phrases as understood in a particular trade or locality or at an earlier date may be explained by parol. To illustrate: Parol evidence has been allowed to show the meaning of "per square yard," as used in plastering, *Walls v. Bailey*, 49 N. Y. 464; "whaling voyage," as used in a marine insurance policy, *Child v. Sun Mut. Ins. Co.*, 5 Super. Ct. (N. Y.) 26; "cabinet and mahogany door making," what business was properly included in this phrase, *Stroud v. Frith*, 11 Barb. (N. Y.) 300; "for the season," as used in a contract of employment, *Waechterhauser v. Smith*, 10 N. Y. S. 535; "team," as used in a contract for the sale of a reaper, *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; "tenement house," as used in a clause in a deed of 1873 restricting use of property and to show whether it included modern apartment houses, *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241; "without time limit," as used in a contract for shipment of macaroni, *Sholl v. Prince Line*, 109 App. Div. 591, 96 N. Y. S. 368. See, also, *Brimberg v. Herzig Co., Inc.*, 200 App. Div. 106, 192 N. Y. S. 830.

But where the terms of the written contract are clear and unambiguous, the intention of the parties must be found therein and extrinsic proof is inadmissible. *Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737. For ex-

ample, parol evidence should be excluded to explain the meaning of "guarantee," *Phelps v. Gamewell Fire Alarm Tel. Co.*, 72 Hun 26, 25 N. Y. S. 654; "*pro rata*," used in insurance policies, *Home Ins. Co. v. Continental Ins. Co.*, 180 N. Y. 389, 73 N. E. 65; "incompatible," used in a written contract of employment, *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. 500. See, also, *Sargent v. Vought*, 194 App. Div. 807, 185 N. Y. S. 578; *Gold v. Ross*, 195 App. Div. 721, 187 N. Y. S. 72. Nor may one show, where the language of the will is plain and unambiguous, that the testator attached a peculiar meaning to ordinary words. *Matter of Quackenbush*, 127 Misc. 731, 217 N. Y. S. 493.

#### § 443. Proof of Technical Terms.

Parol evidence is admissible to show the sense in which technical terms are used in the arts and sciences. This is allowed for the purpose of giving effect to the intention of the parties through the medium of their own language. *Stroud v. Frith*, 11 Barb. (N. Y.) 300. "Port-risk," as used in a marine insurance policy, is a technical term and its meaning may be proved by extrinsic evidence. *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453; *Loom Co. v. Higgins*, 105 U. S. 580, 26 Law. Ed. 1177.

#### § 444. Proof of Circumstances of the Case.

Parol evidence of the circumstances leading up to and attending the execution of the writing is admissible to explain a doubtful meaning. In no other way may it be possible to ascertain the intentions of the parties. *Middleworth v. Ordway*, 191 N. Y. 404, 84 N. E. 291; *U. S. Printing & Lith. Co. v. Powers*, 233 N. Y. 143, 135 N. E. 225. Thus, in construing a memorandum of sale, it was held that, "although parol evidence is not admissible to prove that other terms than those expressed are agreed to or that the parties have other intentions than those to be inferred from it, yet that it is competent to prove not only the relations of the parties and the nature and conditions of the property, but also the acts of the parties at and subsequent to the date of



the contract as a means of showing their own understanding of its terms." *Knight v. Worsted Co.*, 2 Cush. (Mass.) 271. See, also, *Block v. Columbia Insurance Co.*, 42 N. Y. 393.

In an action upon a written contract for the manufacture of typewriting machines, "equal to the complete model machine to be furnished," the plaintiff contended that the machine was complete with one typewheel, while the defendant claimed that two wheels were requisite. The court admitted evidence of the surrounding circumstances and acts of the parties to ascertain which was intended. *Garvin Machine Co. v. Hammond Typewriter Co.*, 12 App. Div. 294, 42 N. Y. S. 564, *aff'd* 159 N. Y. 539, 53 N. E. 1125. See, also, *Reed v. Insurance Co.*, 95 U. S. 23, 24 Law. Ed. 348, wherein the Court held that a clause, "The risk to be suspended while the vessel is at Baker's Island loading," should be construed to mean that the policy should be suspended while the vessel was there for the purpose of loading and not while actually loading.

But the surrounding facts and circumstances cannot be shown when the language is clear and certain. For example, a contract for the sale of bicycles, "to be filled by April 1st or as soon as possible," is not ambiguous, and parol evidence would be inadmissible to show or explain the meaning of the language. *Williams v. Gridley*, 110 App. Div. 525, 96 N. Y. S. 978, *aff'd* 187 N. Y. 526, 79 N. E. 1119. See, also, *Dent v. North Am. Steamship Co.*, 49 N. Y. 390; *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273; *Murdock v. Gould*, 193 N. Y. 369, 86 N. E. 12; *Lossing v. Cushman*, 195 N. Y. 386, 88 N. E. 649.

#### § 445. Parol Evidence to Show Custom or Usage.

The parol evidence rule does not exclude oral testimony to prove a custom or usage, because the parties are presumed to contract with reference thereto; and, therefore, such custom or usage becomes as much a part of the written contract as express conditions in the writing. In the language of the Court of Appeals: "Every legal contract is to be interpreted in accordance with the intention of the



parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties, when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it." *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, quoted with approval in *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105. See, also, *Atkinson v. Tuesdell*, 127 N. Y. 230, 27 N. E. 844. Parol evidence is admissible to explain the meaning which usage has given to words or terms as used in any particular trade or business, or in any particular locality. *Newhall v. Appleton*, *supra*; *Smith Co., Ltd. v. Moscahlades*, 193 App. Div. 126, 183 N. Y. S. 500; *Vietor v. Nat. City Bank*, 200 App. Div. 557, 193 N. Y. S. 868. As a rule, a custom or usage cannot be proved to contravene a rule of law, or to vary the legal construction or express terms of a written instrument. *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350. The same words may, however, have both a common and popular meaning and a peculiar meaning understood by the parties to the contract and based on a customary trade usage. *Gumbinsky Bros. Co. v. Smalley*, 203 App. Div. 661, 197 N. Y. S. 530. In such instances parol evidence may be introduced to explain the meaning of the terms, despite the presence of a generally accepted meaning. *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224. In *Mutual Chemical Co. v. Marden, Orth & Hastings Co.*, 235 N. Y. 145, 139 N. E. 221, the Court said: "The testimony offered to establish the custom or trade usage was not for the purpose of contradicting the express terms of the contract but to explain the meaning of words used therein not in themselves technical but to show that they were used in a particular way in the trade." Editorial, *New York Law Journal*, September 3, 1925.

**§ 446. Parol Evidence to Identify Parties and to Show Their Relationship.**

Parol evidence is competent to identify the parties. Thus, if a deed is made to the son having the same name as the father, it may be shown by parol which one was intended. *Simpson v. Dix*, 131 Mass. 179. When a name in a writing is not the correct one, the error or omission may be corrected and the identity established by extrinsic evidence. *Newbury v. Norfolk & S. R. R. Co.*, 133 N. C. 45, 45 S. E. 356. The true identity of a person who signs a trade or assumed name may be shown by parol. *Martin v. Hemphill*, 237 S. W. (Tex.) 550, 20 A. L. R. 984. In *Wuertz v. Braun*, 113 App. Div. 459, 99 N. Y. S. 340, parol evidence was admitted to show that Mrs. Isidor Braun signed a contract with the name "Isidor Braun," although her husband was a stranger to the contract and she intended to bind only herself.

So, too, oral testimony is admissible, to show the actual relationship of the parties named in the writing. Thus, parol evidence is competent to show that an indorser is an accommodation party, and also to show who is accommodated. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682. Where a charter-party leasing a dredge to a corporation was signed by the corporation and also by the president individually, but contained no reference to the president being a party, it was held competent to show that the dredge owner refused to contract unless the president also signed. *Esselstyn v. McDonald*, 98 App. Div. 197, 90 N. Y. S. 518.

Parol evidence is also competent to show the capacity in which a person acts; as, that a seller named in a contract is only an agent, or that persons not named therein are, in fact, interested. *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547. Such evidence is admissible, however, only when the action is brought for the purpose of charging the principal, but is inadmissible on behalf of the agent, for the purpose of exempting him from liability. *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906; *Hernandez v. Brookdale Mills, Inc.*,

194 App. Div. 369, 381, 185 N. Y. S. 485, Richardson's Cases in Evidence, p. 87. The substantive law of agency governs the admissibility of evidence to show the relationship of parties acting as principal and agent. Thus, in negotiable instruments parol evidence is inadmissible to show that the party signing was acting in a representative capacity, unless it is so indicated. Neg. Inst. Law, secs. 37-39. The same rule is applied in the case of contracts under seal. *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374.

#### § 447. Parol Evidence to Explain Latent Ambiguities.

The old distinction between latent and patent ambiguities, as defined by Sir Francis Bacon in 1597, has been followed in this State down to the present time. In the language of Lord Bacon, a latent ambiguity "is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." Bacon's Law Tracts, Reg. 23, p. 99. As an illustration of his meaning, Lord Bacon goes on to say: "If I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all, but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore, it shall be holden by averment whether of them was that the party intended should pass." The ambiguity does not appear on the face of the instrument, but lies hidden in the subject matter whereof it speaks. When the ambiguity is raised by extrinsic evidence, it may be removed by the same means. Thus, if a conveyance is made to Richard Roe, and it appears that there are father and son or other persons bearing that name; or if a grant is made to a Methodist church of a certain city, and it appears that there are two Methodist churches in that city, parol evidence is competent to show which one was intended. *Petrie v. Trustees of Hamilton College*, 158 N. Y. 458, 53 N. E. 216, Richardson's Cases in Evidence, p. 774; *Smith v. Finkelstein*, 162 App. Div. 128, 147 N. Y. S. 324. In cases

of latent ambiguity it is always a question of identity. The instrument describes but never identifies. The description must be fitted to the thing described, and this may be done by extrinsic evidence.

**§ 448. Parol Evidence Inadmissible to Explain Patent Ambiguity.**

The classical definition of a patent ambiguity, as formulated by Lord Bacon, is that which "appears to be ambiguous upon the deed or instrument," and the rule is that parol evidence is inadmissible to explain a patent ambiguity. It is clear, however, from the discussion in the foregoing sections, that there are many uncertainties of meaning which are apparent on the face of the instrument that may be resolved by parol evidence. The patent ambiguity within the rule laid down by Lord Bacon is an uncertainty which is apparent upon the face of the instrument and which cannot be definitely resolved even in the light of the surrounding circumstances, without resort to mere speculation and guesswork; as, a bequest to the "poor children" of a certain parish, or a "handsome gratuity to each of my executors." Greenleaf on Ev., 16th Ed., sec. 300. Such an ambiguity cannot be explained by evidence of the writer's expressed intentions, and therefore, since the intention cannot be definitely ascertained in any way, the instrument, or at least the clause containing the ambiguity, must be held void for uncertainty. See *McCarthy v. Krebs Pigment & Chem. Co.*, 118 Misc. 566, 194 N. Y. S. 954, and authorities there cited.

**§ 449. Parol Evidence Affecting the Construction of a Will. Testator's Intention Governs Interpretation.**

It is a fundamental principle, in the interpretation of wills, that the intention of the testator must govern, where it is not inconsistent with rules of law. "The duty of the court is not to make a new will or codicil to carry out some supposed but undisclosed purpose, but to ascertain what the testator actually intended by the language employed by him when properly interpreted, and then to determine whether

such intended provisions are valid or otherwise. The duty of the court is to interpret, not to construct; to construe the will and codicil, not to make new ones." *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 69 N. E. 283. If there is any doubt as to the testator's intention from the language used in the will, the Court, in ascertaining such intention, must take into consideration the facts and circumstances surrounding the execution of the will, including the relation of the parties, the nature and situation of the property and the apparent purpose of the will or special gift; and extrinsic evidence is admissible for the purpose of showing such surrounding facts and circumstances. *Williams v. Jones*, 166 N. Y. 522, 533, 60 N. E. 240; *March v. March*, 186 N. Y. 99, 103, 78 N. E. 704. Guesses at the testator's intentions, however, will not be indulged in. His intention must be ascertained from the language of the will, considered in the light of the surrounding circumstances, free of conjecture, under the guidance of established principles and rules of law. Where the language used is clear and certain, extrinsic evidence is, of course, inadmissible to show that the testator had a contrary intention from that expressed in the will. *Hartman v. City of Pendleton*, 96 Or. 503, 186 Pac. 572, 8 A. L. R. 904. This is true though the words were chosen by the attorney who drafted the will rather than the testatrix. *Dwight v. Faucher*, 245 N. Y. 71, 156 N. E. 186. And in no event can extrinsic evidence be admitted to show an intention which is inconsistent with the express provisions of the will. *Re Tinsley*, 187 Iowa 23, 174 N. W. 4, 11 A. L. R. 826. To illustrate: A testator devised all of his real property "in the county of Limerick, and in the city of Limerick" to certain persons. One of the parties offered to show by parol evidence that the testator intended to include in the devise his estates in the county of Clare. He proved that at the time of executing his will the testator had no real property in the county of Limerick but had an estate in the county of Clare, and he offered to show that in the original draft of the will the devise included all of the real property in the "counties of Clare, Limerick and



in the city of Limerick," and that in the final draft the word "Clare" was omitted by mistake, without being noticed by the testator. This evidence was excluded on the ground that to receive it would be, in effect, to make a new devise for the testator. *Miller v. Travers*, 8 Bing. 244, 131 Eng. Rep. 395; *Michigan Law Review*, December, 1925.

Where a will is read by or to a competent testator before its execution, and no fraud is proved, extrinsic evidence is inadmissible to show that words were included or omitted by mistake. *Guardhouse v. Blackburn*, L. R. 1 Prob. & Div. (Eng.) 109 (1866), *Richardson's Cases in Evidence*, p. 778.

Whereas parol evidence of the circumstances surrounding the execution of a will is admissible for the purpose of putting the court in the position of the testator in order to interpret the language of the will correctly, parol evidence as to what the testator said concerning his intention, either before or after the execution of the will, cannot be received, for to admit such testimony would defeat the statute requiring wills to be in writing. *Wooley v. Hays*, 285 Mo. 566, 226 S. W. 842, 16 A. L. R. 1; *Williams v. Freeman*, 83 N. Y. 561, 569; *Matter of Chambers*, 112 Misc. 551, 183 N. Y. S. 526, *aff'd* 196 App. Div. 934, 187 N. Y. S. 930. The only purpose for which the declarations of a testator can be received as an aid to interpreting the language of his will is to explain a latent ambiguity, as where a person or thing is described in the will in terms equally applicable to two or more. *Matter of Wheeler*, 32 App. Div. 183, 52 N. Y. S. 943, *aff'd* on opinion below, 161 N. Y. 652, 57 N. E. 1128; *Matter of Lummis*, 101 Misc. 258, 266, 166 N. Y. S. 936.

Evidence of facts and circumstances existing subsequent to the execution of the will is inadmissible, for it can have no bearing upon the question of the testator's intention at the time of executing his will. *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332.

Where a testator fails to insert the name of the legatee, or the amount of the bequest, parol evidence is not admissible to supply the blank or omission, because the instrument is incomplete. In such cases there can be no interpre-

tation, for there is nothing to interpret. The ambiguity is patent, and the provision is, therefore, void. Thus, if a provision in a will be "I give — \$5000," no extrinsic evidence is admissible to show that A, B, or C was intended and that the name was omitted by mistake. *Miller v. Travers, supra*; *Legget v. Stevens*, 185 N. Y. 70, 77 N. E. 874.

#### § 450. Parol Evidence to Identify Legatee.

A misnomer or a misdescription of a legatee or devisee does not invalidate the gift if, either from the will or from some extrinsic evidence, the object of the testator's bounty can be ascertained. To illustrate: In *Lefevre v. Lefevre*, 59 N. Y. 434, the will named "Home of the Friendless." There was no such corporation in existence. The name was purely fictitious, and it was held that, for the purpose of proving that The American Female Guardian Society was intended, parol evidence was admissible to show that the name used in the will was the popular and usual name by which the claimant was designated; that the testator knew and called it by that name, and that there was no other corporation answering the description. So, too, in *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191, 11 Am. Rep. 697, the gift was to "The Society for the Relief of Indigent Aged Females." There was no such corporation. The Court said: "It is not necessary that a corporation should be designated by its corporate name to entitle it to take as legatee. It is sufficient if it is so described that its identity can be established; that is, so that it may be distinguished from any other." It was held that the defendant was entitled to the legacy as being more nearly indicated by name and description in the will than the plaintiff. See, also, *Matter of Wheeler*, 32 App. Div. 183, 52 N. Y. S. 943, aff'd 161 N. Y. 652, 57 N. E. 1128; *Kernochan v. Farmers' Loan & Trust Co.*, 187 App. Div. 668, 175 N. Y. S. 831, aff'd 227 N. Y. 658, 126 N. E. 912. Where the language used is equally applicable to two or more persons or corporations, parol evidence is admissible to show which of the two claimants was intended. To illustrate:

A testatrix bequeathed "the sum of \$1,000 to my niece Lena Baumann of Richmond Hill." The plaintiff, whose name was Lena Baumann, was a grandniece of the testatrix and resided at Richmond Hill. The other claimant was a niece named Magdalena Fuhge, whose maiden name had been Magdalena Baumann. Parol evidence was held admissible to show that the testatrix was accustomed to speak of this niece as "Lena Baumann" and to refer to her place of residence as "Richmond Hill," although it was, in fact, about one mile distant from Richmond Hill; and it was held error to exclude evidence as to the instructions given by the testatrix concerning the drawing of the provision in question. *Baumann v. Steingester*, 213 N. Y. 328, 107 N. E. 587. See, also, *Matter of Van Vliet*, 181 App. Div. 879, 169 N. Y. S. 367, *aff'd* 224 N. Y. 572, 120 N. E. 877. For the purpose of identifying the beneficiary intended in such cases, parol evidence is admissible to show not only the circumstances surrounding the testator but also his expressed intentions. *Matter of Coughlin*, 171 App. Div. 662, 157 N. Y. S. 630, *aff'd* 220 N. Y. 681, 116 N. E. 1041.

But a description of the legatee may be too indefinite for an enforcement of the will. For instance, a devise to the person who should take care of the testator during his last illness was held invalid for indefiniteness, *Harrington v. Abberton*, 115 App. Div. 177, 100 N. Y. S. 681; *Matter of Farmer*, 99 Misc. 437, 163 N. Y. S. 1089. And, again, where a will gave to the widow a certain sum for her support, and provided that what was left at her death should "be equally divided between his daughter," but named no other person who should take the other half, it was held that, though the will showed an intention that the other half should go to the son, such intention could not be effectuated as he was not named, and that as to such half, the provision was void for uncertainty. *Leggett v. Stevens*, 185 N. Y. 70, 77 N. E. 874. Though a will may be void for uncertainty as to the legatee or devisee, the Real Property Law, sec. 113, provides that "No gift, grant, or devise to religious, educational, charitable or benevolent uses, which shall in other respects be

valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same." An identical provision is found in Pers. Prop. Law, sec. 12. *Matter of MacDowell*, 217 N. Y. 454, 112 N. E. 117. The statutes apply only to gifts in trust for such purposes, and not to absolute gifts. *Fralick v. Lyford*, 107 App. Div. 543, 95 N. Y. S. 433, *aff'd* 187 N. Y. 524, 79 N. E. 1105. There need be no express words creating a trust, however, provided the purpose of the gift is indicated with sufficient clearness to show that a trust for that purpose was intended. *Bowman v. Domestic & Foreign M. Soc.*, 182 N. Y. 494, 75 N. E. 535; *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. S. 149, *aff'd* 201 N. Y. 546, 95 N. E. 1133.

In the discussion of the general principle that parol evidence is admissible to identify the beneficiary, it must be remembered that no extrinsic evidence independent of the will is competent to disclose an intent of the testator as a fact; it must be received as explanatory thereof, or not at all. Thus, where a devise was to the "Skin and Cancer Hospital" and there were two institutions, named, respectively, "New York Skin and Cancer Hospital" and "New York Cancer Hospital," located in the city where the testator lived and doing work of the same character, it was held that extrinsic evidence was inadmissible to show that the testator meant the latter hospital, as the will described the former institution with sufficient accuracy. *Union Trust Co. v. St. Luke's Hospital*, 74 App. Div. 330, 77 N. Y. S. 528, *aff'd* 175 N. Y. 505, 67 N. E. 1090.

#### § 451. Parol Evidence to Identify Property.

Where there is a latent ambiguity or equivocation as to the property meant to be described in the will, extrinsic evidence is admissible to show the testator's intention, as gathered from the instrument and from surrounding circumstances of the case. To illustrate: Where a testator described a lot as No. 6 in square No. 403, parol evidence



was admitted to show that he did not own the lot described, but did own lot No. 3 in square No. 406. *Patch v. White*, 117 U. S. 210, 29 Law. Ed. 860, 6 Sup. Ct. Rep. 617. A bequest of stock in the A bank will pass stock in the B bank, if that was the testator's only bank stock. *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. Surr. (N. Y.) 144; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363. For a collection of cases and exhaustive note on ambiguities, see *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. (N. S.) 942. Where the testator devised two lots and a gore "on the southerly side of 49th St., near 8th Ave., and there was no property thus located, extrinsic evidence was admitted to show that the property described and devised was located on 149th Street. *Peters v. Porter*, 60 How. Pr. (N. Y.) 422. Where a will gave to "John Turner One house, George Turner One house, William L. Turner One house," parol evidence was admitted to show that the testator owned three houses not otherwise disposed of by the will, and the Court of Appeals held that the sons were entitled to elect, in the order in which they were named in the will, as to the houses which they would take. *Matter of Turner*, 206 N. Y. 93, 99 N. E. 187.

Where words of general description are used in a will or a deed, oral evidence may be resorted to, to locate the premises intended to be conveyed. To illustrate: A deed conveyed all the land bounded "On the north by lands formerly owned by Fayette Selleck; on the east by lands now or formerly owned by Nicholas Palmer; on the south by lands of Marvin Kingsley; on the west by lands owned or occupied in 1890 by John Palmer." Parol evidence was held admissible to locate the boundaries so described. *Mullen v. Washburn*, 224 N. Y. 413, 121 N. E. 59.

#### **§ 452. Parol Evidence Rule Applicable Only between Parties to the Writing.**

The rule excluding parol evidence to contradict or vary a written instrument is applicable only between the parties to the writing and those claiming under them. It cannot be



invoked in favor of or against a stranger to the instrument. *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388; *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994; *Lee v. Carson*, 175 App. Div. 104, 161 N. Y. S. 509. To illustrate: Upon the cancellation of a contract for the sale of real property the defendant agreed that if he sold the property for \$2300 he would pay to the plaintiff the sum of \$76. Upon the trial of an action to recover this sum, the plaintiff proved that the defendant sold the property to one Page and that the consideration stated in the contract of sale between the defendant and Page was \$2400. The defendant then gave oral evidence to show that he received, in fact, only \$2200 for the property. The Appellate Division held that he was entitled to do this because the Parol Evidence Rule did not apply, since the plaintiff was neither a party to the contract of sale between the defendant and Page nor a privy of either party. *Lee v. Carson, supra*. Recently, the Court of Appeals had this problem before them in two cases. They have held that the existence of a written agreement between two parties would not exclude evidence of an additional parol agreement between one of these parties and a third party although the subject matter of the oral agreement might include some matters also dealt with in the written agreement between the two original parties. *Traders Nat. Bank v. Lasker*, 238 N. Y. 535, 144 N. E. 784. Likewise, they have held that evidence of the real relation between a principal and agent or a master and servant may therefore be introduced by a third party even though the principal and agent or master and servant have a written contract which defines that relationship. *Robert v. United States Shipping Board Emergency Fleet Corp.*, 240 N. Y. 474, 148 N. E. 650. See also *Helkin v. Henderson Socy*

*Society of NY* 265 NY 393, 195 NE 245

## CHAPTER XXII.

### COMPETENCY OF WITNESSES

#### § 453. In General.

In general all persons offered as witnesses are presumed to be competent until the contrary is shown to the satisfaction of the court, by whom all such questions are to be determined. "A witness is said to be incompetent to give evidence when the judge is bound, as matter of law, to reject his testimony, either generally or on some particular subject. In all other cases, it is to be received, and its credibility weighed by the jury." Best on Ev., 10th Ed., sec. 132.

#### § 454. Incompetency at Common Law—Modifications by Statute.

At common law persons were incompetent as witnesses

1. Who had no religious belief.
2. Who were bereft of mental capacity.
3. Who had been convicted of infamous crimes.
4. Who were parties to the suit or pecuniarily interested in the event thereof.

The common law disqualifications, as modified by statute in New York, will be discussed in the following sections.

Husband and wife and attorney and client were deemed incompetent at common law, as to matters which were excluded on the ground of public policy. Their incompetency is treated under the topic of "Privileged Communications."

#### § 455. Want of Religious Belief—Oath.

An oath is "an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God." Tyler on Oaths, p. 15; Greenleaf on Ev., 16th Ed., sec. 364a. There-

fore, all persons who did not believe in a God who would punish them if they swore falsely were formerly incompetent to testify. The theory was that the oath was a guaranty of truthfulness. Greenleaf on Ev., 16th Ed., sec. 368. But at the present time, in New York, there is no exclusion upon the ground of religious belief, or the want of it. The New York Constitution of 1847, Art. 1, sec. 3, provides that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." For the administration of an oath or affirmation, see Civil Practice Act, secs. 360-364.

#### § 456. Unsworn Testimony.

In civil cases no unsworn testimony is admissible. The same rule is applicable to criminal cases, with the single exception that, in criminal cases, a child actually or apparently under twelve years of age who does not, in the opinion of the court or magistrate, understand the nature of an oath, may testify, without being sworn, if he appears to be possessed of sufficient intelligence to justify the reception of the evidence. But a conviction cannot be had upon such testimony unsupported by other evidence. Code of Crim. Pro., sec. 392; *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164, *Richardson's Cases in Evidence*, p. 781.

The parties may, however, waive the administration of the oath, and the waiver may be either expressed or implied. *People ex rel. Niebuhr v. McAdoo*, 184 N. Y. 304, 77 N. E. 260.

#### § 457. Want of Mental Capacity.

"A person offered as a witness must have the organic capacity to receive correct impressions, to record them in memory and recollect them, and to narrate them intelligently." Greenleaf on Ev., 16th Ed., sec. 370b. Therefore, if one is incapacitated to such an extent as not to know or understand the questions at issue, or is totally unworthy of reliance, he is incompetent as a witness.

**§ 458. Insanity.**

If it appears to the court that an insane person understands the obligation of an oath, and is capable of giving a correct account of matters which he has seen or heard in reference to the questions at issue, his testimony will be admitted. *Reg. v. Hill*, 5 Cox Cr. Cas. (Eng.) 259; *Barker v. Washburn*, 200 N. Y. 280, 93 N. E. 958, 34 L. R. A. (N. S.) 159. When a witness is called for a party, the opposing party may object that the witness is incompetent, and it then becomes the duty of the court to make an examination as to the capacity of the witness before he is sworn. For this purpose the court may examine the proposed witness himself and any competent witnesses who can speak as to the nature and extent of his insanity. *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840. After a witness has been sworn, evidence as to his mental condition may be received for the purpose of affecting his credibility. The extent to which such an inquiry may go is largely in the discretion of the trial court, but in cases where it appears that, in the interests of truth and justice, such inquiry is necessary, it is error to exclude all evidence which is offered for the purpose of attacking the sanity of the witness. *Ellarson v. Ellarson*, 198 App. Div. 103, 190 N. Y. S. 6, 15 A. L. R. 932, note, *Richardson's Cases in Evidence*, p. 788.

Formerly, persons deaf and dumb from birth were presumed to be idiots, and, therefore, incompetent, but no such presumption now exists. Today they may testify by signs, writing, or other available means as may be approved by the court. *People v. McGee*, 1 Denio (N. Y.) 19; *State v. Weldon*, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126; *Bugg v. Houlika*, 122 Miss. 400, 84 So. 387, annotated 9 A. L. R. 480.

**§ 459. Infancy.**

There is no definite rule as to the age at which a person is competent to testify. The test is always an individual one. In *Wheeler v. United States*, 159 U. S. 523, 40 Law. Ed. 244, 16 Sup. Ct. Rep. 93, *Richardson's Cases in Evidence*,

p. 791, it was held not to be error to admit the testimony of a boy *five* years old. The Court said: "That the boy was not by reason of his youth, as a matter of law absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous." Therefore, the competency of children as witnesses depends upon their intelligence, judgment, and understanding, and their ability to comprehend the nature and effect of an oath. A witness six and a half years old, who knew she would be punished if she told an untruth, was held competent, in *Agnew v. Brooklyn City R. R. Co.*, 24 N. Y. St. Rep. 744, *aff'd* 117 N. Y. 651, 22 N. E. 1132.

When a child under the age of twelve or fourteen years of age is called as a witness, it becomes the duty of the trial court to examine him before he is sworn, "to ascertain his capacity and the extent of his knowledge," and a failure to conduct such a preliminary examination is ground for a reversal. Civil Practice Act, sec. 365; *Olshansky v. Prensky*, 185 App. Div. 469, 172 N. Y. S. 856.

#### § 460. Intoxication.

A witness in a state of intoxication is incompetent, and the judge may decide from his own view the state of the witness in that respect. *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.



**§ 461. Conviction of Infamous Crimes.**

At common law persons who had been convicted of infamous crimes and sentenced could not testify. Greenleaf on Ev., 16th Ed., secs. 372 and 373. But the disqualification of witnesses resulting from the conviction of crimes has been entirely removed by statute in New York. Penal Law, sec. 2444; Civil Practice Act, sec. 350; *People v. McGloin*, 91 N. Y. 241, 249. Even a conviction for perjury does not disqualify. The federal courts have finally adopted the same rule. *Rosen v. United States*, 245 U. S. 467, 62 Law. Ed. 406, 38 Sup. Ct. Rep. 148, *Richardson's Cases in Evidence*, p. 793. The conviction may be shown, however, to affect the credibility of the witness. Penal Law, sec. 2444; Civil Practice Act, sec. 350. See *Shea v. U. S. Trucking Corp.*, 200 App. Div. 821, 825, 193 N. Y. S. 693.

**§ 462. Parties to the Suit or in Interest.**

Parties to the suit or persons having an interest in the event of the action were totally disqualified as witnesses at common law. But disqualification arising from such causes has been, with but one exception, entirely abolished by statute. Civil Practice Act, sec. 346. The interest of the witness may still be shown, however, for the purpose of affecting his credibility.

Under the old New York rule it was held that the uncontradicted testimony of an interested witness involved a question of fact to be determined by the jury, on the theory that the jury was entitled to disbelieve such a witness purely by reason of his interest, even though his testimony was uncontradicted and unimpeached. *Wohlfahrt v. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406. This rule was limited, however, by the decision in *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102, *Richardson's Cases in Evidence*, p. 796, where it was held that where the testimony of a party to the action "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusive-

ness." See, also, *American Surety Co. of New York v. Palmer*, 211 App. Div. 172, 206 N. Y. S. 817. For a review of the New York authorities on this subject see 8 A. L. R. 824.

An important exception to the rule that a party who has an interest in the action is not thereby disqualified from testifying has been created by statute. The Civil Practice Act, sec. 347, (formerly, Code of Civil Pro., sec. 829) provides that:

"Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

The policy of this provision is to limit the introduction of testimony of a party to the action or interested witness as against the estate or survivors of a deceased person. Although parties and interested witnesses are now competent to testify, yet fairness requires that some exception should be made where the adversary in the controversy is dead; where death silences one, the law will silence the other. The purpose of the statute is, therefore, to put both parties on

an equality. The section in question may be analyzed to advantage as follows:

a. Upon what Proceedings Applicable?

"Upon the trial of an action or the hearing upon the merits of a special proceeding.

b. Who Disqualified?

a party or a person *interested* in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise.

c. As Witness for Whom?

shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest.

d. Against Whom?

against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise.

e. Concerning What?

concerning a personal transaction or communication between the witness and the deceased.

f. Exception.

person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication.

A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

### § 463. Upon What Proceedings Applicable?

"Upon the trial of an action or the hearing upon the merits of a special proceeding," refers only to civil, and not to criminal actions. It is applicable to surrogates' courts and proceedings therein. *Snyder v. Sherman*, 88 N. Y. 656. The trial of a specific question under the Civil Practice Act, sec. 430, is also subject to the restrictions of section 347. *Parks v. Andrews*, 56 Hun 391, 10 N. Y. S. 344.

### § 464. Who Disqualified?

"A party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise," is disqualified. Thus, the restriction on the competency of witnesses is applicable not only to parties on the record and parties having an interest in the result, but to assignors and others through whom a party claims or derives his interest. To illustrate: A assigns to B a claim against Y. Y dies and B brings an action against his estate. Neither A nor B is a competent witness. B is an interested party and A is his assignor, or party through whom B derived his interest. In *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916, *Richardson's Cases in Evidence*, p. 816, a mother who made a contract with the putative father of her child for a settlement of \$100,000 on the child upon his tenth birthday, in consideration of her keeping the child in New York, was held to be an incompetent witness in an action by the child to enforce the contract, because whatever rights the plaintiff claimed were derived through his mother.

Judge Pound, however, speaking for the Court of Appeals in *Croker v. New York Trust Co.*, 245 N. Y. 17, 156 N. E. 81, referred to this case in a dictum as follows: "The broad authority of *Rosseau v. Rouss*, *supra*, has thereby, by implication, been somewhat shaken. Whether it would be applied if necessary to a decision or whether the closer if less ethical reasoning of the earlier cases would now be accepted, we need not determine."

The Court of Appeals has held, however, that a mere

vendor of personal property is not a person "from, through or under whom" a party "derives his interest or title by assignment or otherwise," within the meaning of section 347, so as to preclude him from testifying in an action in which the validity of the sale is not involved. *Abbott v. Doughan*, 204 N. Y. 223, 97 N. E. 599, *Richardson's Cases in Evidence*, p. 829. In the case last cited, the plaintiff sued to recover possession of a diamond ring which she claimed to have loaned to defendant's intestate. On the trial, a dealer in jewelry testified that the plaintiff bought the ring and paid for it and that at the same time the plaintiff loaned the ring to defendant's intestate. In holding this testimony admissible, the Court said, at p. 226: "In construing the language last quoted, we should keep in mind the fundamental purpose of section 829 (Civil Practice Act, sec. 347). This, of course, was to prevent a person who was or who might be assumed to be a partisan witness from giving his version of a transaction with another who was deceased and could not speak. In effectuating this purpose the Code naturally took into account a person or party who was directly and legally interested in the event of the suit. It also included a person under whom an assignor or otherwise a party or interested person derived his interest or title, and which assignor would be morally and indirectly, if not legally and directly, interested in maintaining the validity and integrity of the assignment, and, therefore, to that extent would be a biased witness." The Court went on to point out that the dealer from whom the plaintiff bought the ring could have no possible interest in the controversy which arose subsequently concerning the alleged loan. No previous owner of property save the last owner "from, through or under whom" the deceased derived his interest is excluded as a witness. So if A sold a watch to B, B sold it to C, and C died, A would be a competent witness although B would not. *Rank v. Grote*, 110 N. Y. 12, 17 N. E. 665; *Bishop v. Bishop*, 121 Misc. 509, 201 N. Y. S. 256.

What constitutes interest? "The true test of the interest of a witness is that he will either gain or lose by the direct



legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest remote, uncertain or contingent." *Wallace v. Straus*, 113 N. Y. 238, 21 N. E. 66, *Richardson's Cases in Evidence*, p. 799; *Talbot v. Laubheim*, 188 N. Y. 421, 81 N. E. 163. A distinction between an interest, as thus defined, and an interest in the question is to be noted. A person may be interested only in the question involved, and not in the event of the action. In such instances the witness's interest in the question goes only to his credibility. *West End Brewing Co. v. Utica Trust & Deposit Co.*, 175 App. Div. 477, 162 N. Y. S. 537. To illustrate: In an action to set aside certain deeds to the defendants from their deceased father, two other children of the decedent, who had received similar conveyances at the same time were held competent to testify to personal transactions with their father, on the ground that they were not parties to the action and would not gain or lose by the effect of the judgment therein and that the record could not be used for or against them in any other action. *Hobart v. Hobart*, 62 N. Y. 80, *Richardson's Cases in Evidence*, p. 802.

In an action upon an alleged agreement on the part of J. O., defendant's intestate, to pay plaintiff for the care and support of J. O.'s illegitimate child, the mother of the child, who was not a party to the action, was called as a witness by the plaintiff to prove the contract, and the court held she was not a party or person interested in the event of the action within the meaning of the statute and that "the interest of the witness in the event of the action was, if any, 'remote, contingent and uncertain,' and was an interest in the question as distinguished from an interest in the event." *Connelly v. O'Connor*, 117 N. Y. 91, 22 N. E. 753, *Richardson's Cases in Evidence*, p. 805.

So, too, in an action of ejectment, wherein plaintiff claimed as only son and heir of his father, and the only question at issue was as to the marriage of his parents before his birth, it was held that his mother was a competent

witness to prove the marriage. *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, *Richardson's Cases in Evidence*, p. 375.

In an action against an administrator to recover for services as a nurse, the plaintiff's husband testified that the moneys earned by either of them were held in common, and it was held that he was interested in the event of the action and, therefore, incompetent. *Scheu v. Blum*, 136 App. Div. 592, 121 N. Y. S. 122.

In an action on a promissory note which, together with a mortgage on the land, formed the consideration for a deed, a subsequent mortgagee was held "a person interested in the event" on the ground that the judgment in the action at bar would be *res judicata* against him in a future action to foreclose the mortgage. *Kerwood v. Hall*, 201 App. Div. 89, 193 N. Y. S. 811. In the language of the Court, at p. 93: "The test of that question as established by the authorities is not merely that he may gain or lose by the effect of the judgment in this action but that this judgment will be legal evidence for or against him in some other action." But one is not a "person interested in the event" merely because the outcome may save him the trouble of another lawsuit. *Franklin v. Kidd*, 219 N. Y. 409, 114 N. E. 839, *Richardson's Cases in Evidence*, p. 806.

A possible inchoate right of dower creates an interest sufficient to disqualify a witness under this section. *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. S. 565, *aff'd* 185 N. Y. 128, 77 N. E. 1007; *Hines v. Hines*, 199 App. Div. 688, 192 N. Y. S. 929. To illustrate: Upon a contested probate proceeding the wife of one of the heirs was held incompetent to testify concerning a personal transaction with the testator, on the ground that her husband would take a share in the real property in case the will was denied probate. *Matter of Eno*, 196 App. Div. 131, 187 N. Y. S. 756, *Richardson's Cases in Evidence*, p. 809.

A stockholder is disqualified, by reason of his interest, from testifying on behalf of the corporation. *Andrews v. Reiners*, 112 App. Div. 378, 98 N. Y. S. 658. But an officer

or director, who is not also a stockholder, is not an interested person within the meaning of this section. *Griggs v. Renault Selling Branch, Inc.*, 179 App. Div. 845, 167 N. Y. S. 355.

One who may become liable for costs upon the failure of a suit against an executor, administrator, or other person named in the Civil Practice Act, sec. 347, is a person interested in the event even though he has no other direct financial interest in the result. *Crocker v. New York Trust Co.*, *supra*.

An executor offering a will for probate is not such a party to the proceedings as to preclude him from testifying to personal transactions with the deceased and as a subscribing witness. His right to commissions, as executor, is not an interest which renders him incompetent. *Matter of Wilson*, 103 N. Y. 374, 8 N. E. 731. But an executor who is beneficially interested in the estate is incompetent. *Lane v. Lane*, 95 N. Y. 494. And, upon a proceeding for an accounting, an executor cannot testify to conversations with the testator concerning the basis of a claim against the estate which the executor has allowed and paid and for which he seeks to be allowed credit upon the accounting. *Matter of Smith*, 153 N. Y. 124, 47 N. E. 33.

An interest which disqualifies a witness from testifying concerning a personal transaction with a deceased person must, of course, be a present interest at the time of the trial. One who has parted with his interest is competent to testify. To illustrate: A creditor of the estate who has been paid in full by the administrator is not disqualified from testifying concerning the incurring of the debt. *Matter of Lese*, 176 App. Div. 744, 163 N. Y. S. 1014. A former stockholder, who has parted with his stock before trial, may testify on behalf of the corporation. *Kalman v. Reubel*, 191 App. Div. 402, 181 N. Y. S. 471. The effect on the competency of an interested witness to testify of a renunciation of transfer of his interest by giving a general release of all his rights and claims depends upon the circumstances of the case. Thus a release by one plaintiff which vests his entire

interest in his co-plaintiff will not render him competent as a witness, as in such a case his co-plaintiff takes as assignee or derives his interest through the witness, which is within the prohibition of the statute. *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587. But a legatee will remove his incompetency under the statute by surrendering his legacy by a general release. Though a residuary legatee will gain thereby, he will take nothing in right of the releasing legatee, nor by, through, or under any right of his. *Matter of Wilson*, *supra*; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874. See, also, *Matter of Kindberg*, 207 N. Y. 220, 226, 100 N. E. 789, *Richardson's Cases in Evidence*, p. 314; *Harrington v. Schiller*, 231 N. Y. 278, 285, 132 N. E. 89.

#### § 465. As a Witness for Whom?

The Civil Practice Act, sec. 347, provides that a party or interested person, etc. "shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest." *Matter of Smith*, 153 N. Y. 124, 47 N. E. 33; *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587; *Rosseau v. Rouss*, 180 N. Y. 116, 72 N. E. 916, *Richardson's Cases in Evidence*, p. 816. But where such a witness offers to testify against his own interest, he is competent. Thus, a sister, offering to testify in support of her brother's claim, is a competent witness where the success of his action will be against her interest. *Carpenter v. Soule*, 88 N. Y. 251. See, also, *Matter of Kindberg*, 207 N. Y. 220, 226, 100 N. E. 789, *Richardson's Cases in Evidence*, p. 314; *Harrington v. Schiller*, 231 N. Y. 278, 132 N. E. 89; *Matter of Klein*, 118 Misc. 423, 193 N. Y. S. 755. It is not necessary, in order to remove the disqualification imposed by this section, that the proposed witness should be injured by the offered testimony. It is only necessary that he should not be benefited thereby. *Harrington v. Schiller*, 231 N. Y. 646, 132 N. E. 923.

#### § 466. Against Whom?

"Against the executor, administrator or survivor of a de-



ceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise." Civil Practice Act, sec. 347. The survivor shall not speak when the decedent cannot, unless the representative of the decedent speaks himself, or compels the survivor to tell part, when he waives the right to object to telling the rest. Therefore, in order that section 347 may be invoked for the purpose of disqualifying a witness, the adverse party must represent the decedent or lunatic, or derive his interest from him. *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. 649.

"Executor" or "administrator" includes not only an executor or administrator who is prosecuting or defending an action on behalf of the estate, but also one who is bringing an action for death caused by negligence, under Dec. Est. Law, sec. 130, for the benefit of the husband, wife and next of kin. *Abelein v. Porter*, 45 App. Div. 307, 61 N. Y. S. 144.

"Survivor" includes heirs and next of kin. For example, in an action by a judgment creditor of a grantor to set aside a deed as fraudulent, the grantor is incompetent to testify for the plaintiff, as against the grantee's heirs and executrix, concerning transactions and conversations with the deceased grantee. *Roberts v. Mack*, 98 App. Div. 485, 90 N. Y. S. 526. "Survivor" also includes a surviving partner. *Green v. Edick*, 56 N. Y. 613; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Weiss v. Meyer*, 95 Misc. 145, 159 N. Y. S. 211.

*Paulovico v. Moller*, 190 App. Div. 3, 179 N. Y. S. 224, furnishes a rather extreme illustration of a case in which testimony of a party concerning personal transactions with a deceased person was excluded when offered against a person claiming to derive her title and interest through the deceased. The plaintiff brought a replevin action to obtain possession of certain bonds found in the safe deposit box of the decedent and which plaintiff claimed had been put there for safe keeping at the request of the plaintiff, who owned them. The defendant, who was administratrix and beneficially interested in the estate, was held incompetent to testify to conversations with the decedent, on the ground



that the plaintiff derived her title and interest through the decedent. This case does not seem to fall within the rule laid down in *Ward v. N. Y. Life Ins. Co.*, 225 N. Y. 314, 122 N. E. 207. In holding that a beneficiary of an insurance policy, designated by the insured, does not claim "from, through or under" the insured, the Court said, at p. 319: "The great body of authority makes it plain, by inference at least, that when section 829 (Civil Practice Act, sec. 347) speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and which in fact did not come into existence until his death." An administrator, appointed as the successor of a deceased administrator, has been held to derive his title from, through, or under his predecessor, so as to exclude testimony concerning personal transactions with the deceased administrator. *Carpenter v. Romer & Tremper Co.*, 48 App. Div. 363, 63 N. Y. S. 274; *Blumenthal v. Kelsey*, 95 Misc. 136, 159 N. Y. S. 181.

A party who invokes the aid of section 347 on the ground that he derived his title or interest through a lunatic must show that his assignor was adjudged a lunatic under the Civil Practice Act, Art. 81. Commitment to a state hospital for the insane is not sufficient. *Clark v. Dada*, 183 App. Div. 253, 261, 171 N. Y. S. 205.

The purpose of the statute is, obviously, to protect the estate of a deceased person and all those succeeding to the property and interest of the deceased against claims founded on the testimony of self-seeking and interested witnesses concerning alleged personal transactions with the deceased. Thus, an administrator may not testify upon the proceeding for an accounting concerning personal transactions between himself and the intestate for the purpose of establish-

ing a personal claim adverse to the estate. *Matter of Atkinson*, 192 App. Div. 426, 182 N. Y. S. 780.

### § 467. Concerning What?

"Concerning a personal transaction or communication between the witness and the deceased person or lunatic." Civil Practice Act, sec. 347. The words "transaction" and "communication," as defined by the court, in *Holcomb v. Holcomb*, 95 N. Y. 316, *Richardson's Cases in Evidence*, p. 933, "embrace every variety of affairs which can form the subject of negotiation, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another."

Prior to the decision in *Holcomb v. Holcomb*, *supra*, the courts held that a witness was disqualified from testifying only as to transactions or conversations in which the witness actually participated, but later authorities have gradually enlarged the application of the statute to include any conversations or acts of the deceased person which were personally overheard or witnessed by the person whose testimony is offered. See authorities collated and reviewed, in *Griswold v. Hart*, 205 N. Y. 384, 98 N. E. 918, 42 L. R. A. (N. S.) 320, *Richardson's Cases in Evidence*, p. 833. The construction adopted by the Court of Appeals in that case, "which excludes the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased," is now uniformly accepted and followed by the courts of this State. *Hines v. Hines*, 199 App. Div. 688, 191 N. Y. S. 859.

Personal transactions include impressions or information that a person may acquire through the conduct or condition of another, as well as spoken words. In New York, therefore, an interested witness is incompetent to testify concerning the acts, conduct, demeanor, and conversation of the deceased for the purpose of showing his mental capacity. *Holcomb v. Holcomb*, *supra*; *Matter of Eysaman*, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599. So, too, an interested wit-

ness cannot testify that he saw the deceased write, in order to qualify himself to express an opinion as to the genuineness of the deceased's handwriting. *Wilber v. Gillespie*, 127 App. Div. 604, 112 N. Y. S. 20. Such a witness may, however, express his opinion as to the genuineness of the deceased's handwriting where no objection has been made to the preliminary evidence introduced to qualify the witness. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163. The West Virginia Supreme Court of Appeals held, in a recent case, that grandchildren who had read letters written by their grandmother to their mother, and preserved by the latter, were qualified to testify to their opinion concerning the grandmother's signature, on the ground that their knowledge of the handwriting was obtained otherwise than by means of a personal transaction with the deceased. *Johnston v. Bee*, 84 W. Va. 532, 100 S. E. 486, 7 A. L. R. 252.

A physician, in an action for the value of professional services rendered to a deceased person, cannot testify to the calls he made and their date, to rendering bills, etc., as they were personal transactions with the deceased. *Russell v. Hitchcock*, 105 App. Div. 315, 93 N. Y. S. 950; *Kennedy v. Mulligan*, 173 App. Div. 859, 160 N. Y. S. 105. But his books of account can be used against the personal representatives, provided the testimony of the plaintiff is not used to supply the necessary preliminary proof required for the admission of the books, so far as such testimony relates to the account with the deceased.

The section under discussion forbids not only direct testimony by a witness that a personal transaction did or did not take place, but also any attempt by indirection to prove the same thing. *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392, *Richardson's Cases in Evidence*, p. 822; *Boyd v. Boyd*, 164 N. Y. 234, 242, 58 N. E. 118. To illustrate: In *Clift v. Moses*, *supra*, in an action upon four promissory notes, the defendant claimed that the notes had been paid to the plaintiff's deceased partner. As the defendant was incompetent to testify to personal transactions with the deceased, his counsel sought to prove that the notes were in the defend-

ant's possession prior to the death of plaintiff's partner, for the purpose of raising an inference that the notes had been paid. For this purpose the witness was asked whether he had ever had the notes in his possession and whether he had ever seen the notes when the deceased was not present. In excluding all of this testimony, the Court said, at p. 435: "It has been held with general uniformity that the section prohibits, not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings, and testifying to what on its face may seem an independent fact, when in truth it had its origin in, or directly resulted from, a personal transaction." Where, however, delivery is established by independent, uncontradicted evidence, proof of possession does not imply a personal transaction. *Rosenberg v. N. Y. C. R. R. Co.*, 180 App. Div. 79, 167 N. Y. S. 518.

After the death of the payee, the maker of a note, when sued, cannot testify as to the consideration therefor, or that it was accommodation paper. *Cody v. Hadcox*, 98 App. Div. 467, 90 N. Y. S. 873. Nor may the holder of a note testify that indorsements of the payment of interest, upon which he relies to take the note out of the Statute of Limitations, were made by him during the lifetime of the maker. In *Matter of Ennever*, 116 Misc. 32, 189 N. Y. S. 177, it was held that the testimony of an interested party, which, supplemented by the testimony of a disinterested witness, would become part of a personal transaction with the deceased, is incompetent. In that case, a claimant against the estate testified that he withdrew certain money from the bank and gave it to a messenger, and the messenger testified that he delivered it to the deceased. This testimony was held incompetent as an attempt to prove a personal transaction with the deceased by indirection.

The prohibition of section 347 does not extend to personal



transactions with the agent of a deceased person. Therefore, an interested party may testify to transactions with an agent, though the principal and agent, or either of them, be deceased. *Warth v. Kastriner*, 114 App. Div. 766, 100 N. Y. S. 279; *McCarthy v. Stanley*, 151 App. Div. 358, 136 N. Y. S. 386. The mere presence of the deceased during the transaction is immaterial, provided he took no part in it. *Burke v. Higgins*, 178 App. Div. 816, 166 N. Y. S. 199.

### § 468. Exception.

The testimony of an interested witness is prohibited, "except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication." Civil Practice Act, sec. 347. When the personal representative or survivor of the deceased person testifies in his own behalf concerning a personal transaction with the deceased, or when the testimony of the deceased given in a former action or proceeding is read in evidence, this "opens the door" to the adverse party, or interested witness, who would otherwise be incompetent, to testify concerning the same transaction or communication. *Potts v. Mayer*, 86 N. Y. 302; *Minns v. Crossman*, 118 Misc. 70, 193 N. Y. S. 714. But such testimony must be confined strictly to the same transaction or communication. The door is not opened to the adverse party to testify concerning any other independent transaction with the deceased. *Martin v. Hillen*, 142 N. Y. 140, 36 N. E. 803; *Motz v. Motz*, 85 App. Div. 4, 82 N. Y. S. 926. The cross-examination of the personal representative or survivor concerning a personal transaction with the deceased does not "open the door" to the adverse party to testify concerning the same transaction, as, in such case, the personal representative or survivor is not "examined in his own behalf" within the meaning of the exception. *Corning v. Walker*, 100 N. Y. 547, 3 N. E. 290.

The "testimony of the lunatic or deceased person" which



is relied upon to remove the disqualification of an interested witness must be the sworn testimony of the lunatic or deceased given upon a former trial or hearing. Mere declarations of the deceased which are received as admissions or declarations against interest, or under any other exception to the Hearsay Rule, do not "open the door" to the adverse party to testify concerning the personal transaction involved. *Lyon v. Ricker*, 141 N. Y. 225, 231, 36 N. E. 189, *Richardson's Cases in Evidence*, p. 424; *Farmers' Loan & Trust Co. v. Wagstaff*, 194 App. Div. 757, 762, 185 N. Y. S. 812. It was held, in *Matter of Callister*, 153 N. Y. 294, 47 N. E. 268, that a note, signed by the deceased and put in evidence by the next of kin, did not constitute the testimony of the deceased person within the meaning of the statute.

#### § 469. Waiver of Disqualification.

Where a party or interested witness is examined by the adverse party concerning a personal transaction with the deceased, this does not "open the door" to such witness to testify in his own behalf concerning the same transaction by reason of the exception discussed in the preceding section. "But that section was not intended to abrogate the principle in the law of evidence, that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. . . . If a party calls the adverse party and examines him as to a personal communication or transaction with a deceased person, in reference to which he would be precluded from testifying in his own behalf under that section, the witness is entitled to state the whole transaction or conversation and thereby explain or qualify the testimony called out by the other party." *Nay v. Curley*, 113 N. Y. 575, 578, 579, 21 N. E. 698, *Richardson's Cases in Evidence*, p. 840. By calling the adverse party to testify concerning a personal transaction with the deceased, the personal representative

or survivor has, to that extent, waived the benefit of the statute. *Cole v. Sweet*, 187 N. Y. 488, 80 N. E. 355.

A waiver of the disqualification may also result from a failure to make proper and timely objections to questions. Evidence, incompetent under section 347, if not objected to, is entitled to consideration. *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. S. 967; *Ralley v. O'Connor*, 71 App. Div. 328, 75 N. Y. S. 925, *aff'd* 173 N. Y. 621, 66 N. E. 1115.

Where a committee of a lunatic has been appointed and has waived the provisions of the Civil Practice Act, sec. 347, the waiver does not bind the executor or administrator upon a subsequent trial, and the administratrix may at that time interpose an objection based upon the incompetency of an interested witness. The provisions of the Civil Practice Act, sec. 348, however, permit the reading of testimony received on a former trial where the witness is now incompetent under the Civil Practice Act, sec. 347. Consequently, although the witness may not testify against the executor or administrator, the testimony of the witness on the former trial may be read. *Dean v. Halliburton*, 241 N. Y. 354, 150 N. E. 141.

#### § 470. How Objection Should Be Made.

The objection should be directed against the competency of the witness and not to the competency of his testimony. The evidence may be relevant and competent, but the interested witness is incompetent to testify to the facts sought to be established. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163; *Matter of Farley*, 91 Misc. 185, 196, 155 N. Y. S. 63. The proper way of taking an objection under section 347 is to state that the witness is incompetent to answer such question because it involves a personal transaction between him and the deceased prohibited by the Civil Practice Act, sec. 347. *Russell v. Hitchcock*, 105 App. Div. 315, 93 N. Y. S. 950.

#### § 471. Stockholder or Officer of Banking Corporation.

The statute expressly excepts stockholders or officers of a banking corporation from the rule disqualifying interested

parties from testifying to personal transactions with a deceased person. The Civil Practice Act, sec. 347, provides that "a person shall not be deemed interested for the purpose of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof." Therefore, an officer or stockholder of a banking corporation is competent to testify to a personal transaction with a deceased person. But a stockholder of a corporation other than a banking corporation is disqualified as a witness under this statute, by reason of his interest in the event of the action. *Keller v. West, Bradley & Cary Mfg. Co.*, 39 Hun 348; *Andrews v. Reiners*, 112 App. Div. 378, 98 N. Y. S. 658; *Peterson v. Merchants' Elevator Co.*, 111 Minn. 105, 126 N. W. 534, 137 Am. St. Rep. 537, 27 L. R. A. (N. S.) 816. An officer or director, who is not also a stockholder, is not "a person interested in the event" of the action and is not, therefore, disqualified under section 347. *Griggs v. Renault Selling Branch, Inc.*, 179 App. Div. 845, 167 N. Y. S. 355.

#### § 472. Judges as Witnesses.

The disqualification of judges as witnesses is complete, so far as the trial in which they are presiding is concerned. *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *People v. Miller*, 2 Park. Cr. (N. Y.) 197.

In the language of the Court, in *People v. Dohring*, *supra*, at p. 379: "Therefore the inclination of the courts has been to hold, that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he do not return to the bench." Referees and arbitrators are in the same position. *Morss v. Morss*, 11 Barb. (N. Y.) 510. But the disqualification does not extend to matters concerning trials had before them, where they are called as witnesses in another or subsequent pro-

ceeding. See *Huff v. Bennett*, 6 N. Y. 337; *Rogers v. State*, 60 Ark. 76, 29 S. W. 894.

### § 473. Jurors as Witnesses.

It is well settled that a juror may leave the jury box and be sworn as a witness on a trial before himself and his fellows. See authorities cited in *People v. Dohring*, 59 N. Y. 374, 378, 17 Am. Rep. 349; *Chamberlayne's Modern Law of Ev.*, Vol. I., sec. 581. But a juror is incompetent to impeach his own verdict. *Clum v. Smith*, 5 Hill (N. Y.) 560; *Williams v. Montgomery*, 60 N. Y. 648; *People v. Sprague*, 217 N. Y. 373, 381, 111 N. E. 1077; *Dean v. The Mayor*, 29 App. Div. 350, 51 N. Y. S. 586; *Matter of Brasher*, 113 Misc. 48, 184 N. Y. S. 696. Therefore, a juror may not testify to anything that took place in the jury room for the purpose of showing that a verdict was arrived at through mistake or misconduct. An excellent illustration is found in the case of *McDonald v. Pless*, 238 U. S. 264, 59 Law. Ed. 1300, 35 Sup. Ct. Rep. 783. Upon the hearing of a motion to set aside the verdict, one of the jurors offered to testify that the verdict had been arrived at by writing down the amount which each juror thought the plaintiffs were entitled to recover and dividing the total by twelve. In holding this testimony inadmissible, the Court said: "The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror as to the misconduct of himself or the other members of the jury is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room. These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to



set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harrassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

A juror may testify to what took place in the jury room, however, in a proceeding against a fellow juror for contempt, where the verdict is not sought to be impeached. *People ex rel. Nunns v. County Court*, 188 App. Div. 424, 176 N. Y. S. 858. And affidavits of jurors may be received to show that a verdict has been erroneously reported to the court. *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544.

#### § 474. Grand Jurors as Witnesses.

A grand juror may not testify in what manner he or his fellows voted, or what opinion was expressed by any of them, upon any question before them. Code of Crim. Pro., sec. 265. A grand juror may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or upon a prosecution against the witness for perjury. Code of Crim. Pro., sec. 266; *People v. Goodheim*, 188 App. Div. 148, 176 N. Y. S. 468, 37 N. Y. Crim. Rep. 541. It has been argued that the inference to be drawn from these statutory provisions is that all of the proceedings before a grand jury are required to be kept secret except in cases falling clearly within the exception laid down in the



Code of Criminal Procedure, sec. 266. The better rule seems to be, however, that the production of the minutes of the proceedings of the grand jury can be compelled or the testimony of members of the grand jury, with respect to the statements made by witnesses before them, received, whenever the trial court deems it necessary in the interest of justice. *People v. Naughton*, 38 How. Pr. (N. Y.) 430; *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087.

## CHAPTER XXIII.

### COMPETENCY OF WITNESSES (Continued)

#### Privileged Communications

##### § 475. Privileged Communications Defined.

The term "privileged communications" is used to designate any information which one person derives from another by reason of the peculiarly confidential relationship existing between the parties. Upon grounds of public policy, the parties to such privileged communications are, under certain circumstances, made incompetent, by law, to testify to such communications. The four relationships which the law recognizes as privileged are:

1. Attorney and client;
2. Clergyman and penitent;
3. Physician and patient;
4. Husband and wife.

#### COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

##### § 476. General Rule.

The general rule which forbids an attorney from disclosing any communication made to him by his client, or his advice given thereon, in the course of his professional employment, is one of the earliest rules of the common law. The Civil Practice Act, sec. 353, which provides that "an attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counsellor be allowed to disclose any such communication or advice given thereon," is merely a re-enactment of the common law rule. *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651; *Matter of King v. Ashley*, 179 N. Y. 281, 72 N. E. 106.

The privilege is extended to all communications made in secret and in confidence to an attorney, whether they appertain to any suit then pending or contemplated, or to other matters proper for professional advice. *Whiting v. Barney*, 30 N. Y. 330; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *Richardson's Cases in Evidence*, p. 882. It is also the rule that the client cannot be compelled to disclose communications which his attorney cannot be compelled to disclose. Were it otherwise, the sealing of the lips of his attorney would not afford him adequate protection. *Carnes v. Platt*, 59 N. Y. 405; *Matter of People v. Cravath*, 58 Misc. 154, 110 N. Y. S. 454; *Hemenway v. Smith*, 28 Vt. 701.

### § 477. Origin and Reason of Rule.

The origin and reason of the rule are clearly set forth, in *Whiting v. Barney*, 30 N. Y. 330, 332, in the language following: "In ancient times, parties litigant were in the habit of coming into court, and prosecuting or defending their suits, in person. Subsequently, however, as lawsuits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the law and in the practice of the courts. This necessity gave rise, at an early day to the class of attorneys; to facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party."

Other well reasoned passages from eminent authorities on the origin and reason of the rule are found in *Whiting v. Barney*, *supra*.

**§ 478. What Constitutes the Practice of Law.**

The right to practice law is in the nature of a franchise from the state conferred only for merit. No one can practice law unless he has taken an oath and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension and removal. A corporation may not practice law either directly or indirectly. *Matter of Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15. The practice of law is not limited to appearance in court. Therefore, the preparation of papers, contracts, and other documents by which legal rights are secured and to hold oneself out as entitled to draw and prepare such documents, is a violation of section 270 of the Penal Law making it a misdemeanor to practice law without a license. *People v. Alfani*, 227 N. Y. 334, 125 N. E. 671. In that case the Court said, "Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have been long classed as law practice. The legislature is presumed to have used the words as persons generally would understand them and not being technical or scientific terms. To practice as an attorney at law means to do the work as a business, which is commonly and usually done by lawyers here in this country." For a discussion of what a title insurance company may lawfully do in drawing legal instruments in connection with its authorized business, see *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666; *People v. Title Guarantee & Trust Co.*, 191 App. Div. 165, 181 N. Y. S. 52.

**§ 479. Necessity that Relation Exist.**

The relation of attorney and client must exist, and it must exist with reference to the matter to which the professional communication relates. *Rosseau v. Bleau*, 131 N. Y. 177, 183, 30 N. E. 52. For example: Where the attorney for the plaintiff called the defendant upon the telephone and gave him some friendly advice, in reply to which

the defendant made certain damaging admissions, it was held that the conversation was not privileged, since the defendant had never employed the witness as his attorney or even sought professional advice from him. *Kitz v. Buckmaster*, 45 App. Div. 283, 61 N. Y. S. 64.

The person consulted must be an attorney, duly licensed by the state to practice law. *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *Richardson's Cases in Evidence*, p. 882. As to what constitutes the practice of law, see *People v. Alfani*, 227 N. Y. 334, 125 N. E. 671, *Richardson's Cases in Evidence*, p. 899; *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666; *Tanenbaum v. Higgins*, 190 App. Div. 861, 180 N. Y. S. 738. The client's belief that he is consulting an attorney when he is not, will not give him the protection of the privilege. Thus, a communication to a law student is not privileged, unless he is a clerk of the attorney. Clerks, stenographers, or other persons employed by the attorney are not allowed to disclose any confidential communications which may come to them by reason of their employment. Civil Practice Act, sec. 353; *Sibley v. Waffle*, 16 N. Y. 180; *Lecour v. Importers & Traders' Nat. Bank*, 61 App. Div. 163, 168, 70 N. Y. S. 419. The payment of a retainer or fee is not essential to the creation of the relationship. Nor is it necessary that a suit be pending or contemplated. "Every communication which a client makes to his legal adviser, for the purpose of professional aid or advice upon the subject of his rights and liabilities is protected." *Bacon v. Frisbie*, *supra*.

While communications made to an attorney, with a view to employing him in the matter to which the communications relate are privileged, even though the attorney declines the case, yet communications made to an attorney, without a view to his employment, or after refusal of employment by the attorney, or after his employment has ceased and the relationship terminated, are not privileged. To illustrate: Where the accused had asked his former attorney to act as his counsel and the attorney had advised him that he could not do so because he was the magistrate in



the case, and the accused, nevertheless, sent for him and confided in him as to the facts in the case, it was held that the communications, although clearly confidential, were not privileged, since no relation of attorney and client existed at the time they were made. *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486. Where the relation of attorney and client has wholly ceased, subsequent communications concerning the subject of the former employment are not privileged. *Yordan v. Hess*, 13 Johns. (N. Y.) 492; *Fox v. Forty-four Cigar Co.*, 90 N. J. L. 483, 101 Atl. 184, annotated 5 A. L. R. 723. But a communication which is privileged when made remains privileged forever, unless the privilege is waived by the client. 5 A. L. R. 729.

#### **§ 480. Enjoining Secrecy Unnecessary.**

As the relation of attorney and client is, of itself, of a confidential character, the client need not, in order to protect his communication against disclosure, obtain from his attorney a pledge of secrecy. The relation itself seals the lips of the attorney, and this is true even though the client does not know of the privilege. *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

#### **§ 481. Statements of Both Attorney and Client Privileged.**

The statements and advice of the attorney, as well as the communications of the client, are privileged. *Matter of Whitlock*, 51 Hun 351, 3 N. Y. S. 855.

#### **§ 482. Who May Claim Privilege.**

The privilege belongs strictly to the client. While the attorney may, in the first instance, raise the question of privilege, he cannot insist on it, if waived by the client. The law is now well settled that the privilege survives the client and may be claimed by his personal representatives. *Pearsall v. Elmer*, 5 Redf. (N. Y.) 181.

**§ 483. Waiver of Privilege by Client.**

If the client deems it advisable, he may waive the privilege, whereupon the attorney may be compelled to disclose the confidential communications. Prior to 1891, no particular time, place, or manner of making the waiver was required; the only requirement (Code of Civil Pro., sec. 836) being that the privilege should be "expressly waived." Between 1891 and 1899, the Code of Civil Procedure, sec. 836, was amended several times so as to require the waiver to be thereafter made by the client "upon the trial or examination," or by stipulation of attorneys before trial, except in one instance; *viz.*, where an attorney becomes one of the subscribing witnesses to a will. The Civil Practice Act, sec. 354 (formerly Code of Civil Pro., sec. 836) provides: "The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. . . . But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. The waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, prior to the trial, may stipulate for such waiver, and the same shall be sufficient therefor." No waiver is effectual unless made by the client in one of the modes expressly prescribed by that section. *Gick v. Stumpf*, 126 App. Div. 548, 110 N. Y. S. 712.

When the client himself voluntarily testifies to the communication in question, it is equivalent to an express waiver on his part, in open court, of any privilege accorded by the statute. *People v. Patrick*, 182 N. Y. 131, 175, 74 N. E. 843. But testimony of the client which is brought out on cross-

examination does not amount to a waiver on his part, so as to render the attorney competent to testify concerning the privileged communication. *Kaufman v. Rosenshine*, 97 App. Div. 514, 90 N. Y. S. 205, aff'd 183 N. Y. 562, 76 N. E. 1098. See, also, *Matter of People v. Cravath*, 58 Misc. 154, 110 N. Y. S. 454.

The right to waive the privilege does not survive the client. His death, therefore, puts an irrevocable seal upon all privileged communications to his attorney, unless the privilege was waived during his lifetime. *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648, *Richardson's Cases in Evidence*, p. 892.

#### § 484. Waiver by Requesting Attorney to Witness Will.

The common law rule was that communications made by a client to his attorney to enable him to draw a will were confidential and could not be disclosed during the lifetime of the client, but that after the client's death the attorney was at liberty to testify in support of the will, although he was incompetent to testify to facts tending to defeat the probate of the will. *Sheridan v. Houghton*, 16 Hun 628, aff'd 84 N. Y. 643. This amounted to a ruling that the proponents of the will were entitled to waive the privilege on behalf of their testator. The Civil Practice Act, sec. 354, as it stands at the present time, however, makes it very clear that the right to waive the privilege can be exercised only by the client himself in one of the ways expressly provided for in the statute. It is well settled, therefore that unless the attorney becomes a subscribing witness to the will, his lips are forever sealed as to all facts learned in the course of his professional employment in connection with the drawing thereof. *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648; *Matter of Eno*, 196 App. Div. 131, 187 N. Y. S. 756, *Richardson's Cases in Evidence*, p. 809. But by requesting the attorney who draws his will to become a subscribing witness thereto, the testator waives the privilege of secrecy as to all things said or done, either by himself or his attorney, in regard to the preparation of the will or its execution.

The attorney may also testify, upon the probate proceeding, to anything else which he learned through his relationship with the testator, such as facts as to the testator's mental or physical condition, and things said and done by him indicating such condition. Civil Practice Act, sec. 354; *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71; *Matter of Coughlin*, 171 App. Div. 662, 157 N. Y. S. 630, *aff'd* 220 N. Y. 681, 116 N. E. 1041.

**§ 485. What Constitutes a Communication.**

A communication is information conveyed by a client to his attorney, either orally or by writing, or by papers of the client which he has shown to the attorney. *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33. The privilege also extends to a communication made by an agent, either orally or by letter, provided it is clearly shown that the person making the communication was the authorized agent of the client for the purpose of making the communication to the attorney. *LeLong v. Siebrecht*, 196 App. Div. 74, 187 N. Y. S. 150. But information relating to the client's business acquired from other persons or other sources is not privileged, even though it comes to the attorney's knowledge while he is acting as counsel. *Matter of King v. Ashley*, 179 N. Y. 281, 72 N. E. 106.

**§ 486. Communication Must Be Confidential.**

The Civil Practice Act, sec. 353, does not expressly provide that the communication shall be confidential, but the courts have so interpreted it. The communication must be intended for the attorney alone and not for any other person. Therefore, if a communication is made in the presence of a stranger or third party, or if the client intends that it shall be disclosed to some one else, or if he himself discloses it, the privilege does not apply, because the communication is not deemed to be made in professional confidence. *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846; *Doheny v. Lacy*, 168

N. Y. 213, 61 N. E. 255, Richardson's Cases in Evidence, p. 886; Baumann v. Steingester, 213 N. Y. 328, 107 N. E. 578; Baxter v. Baxter, 92 Misc. 567, 156 N. Y. S. 521. As stated by the Court, in Baumann v. Steingester, *supra*, at p. 333: "In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged." Upon this reasoning, it would seem logical to hold that an attorney who witnessed the execution of a will might testify to facts connected with its execution, even though he was not a subscribing witness, for the reason that the execution of a will is necessarily a public act, performed in the presence of witnesses. The New York Surrogates' Courts, however, appear to have arrived, somewhat reluctantly, at a contrary conclusion. Matter of Francis, 73 Misc. 148, 132 N. Y. S. 695; Matter of Seymour, 76 Misc. 371, 136 N. Y. S. 942. In Matter of Francis, *supra*, the learned Surrogate stated that, although, as an original proposition, he might think such testimony competent, he felt bound to reject it, and cited, as his only authority, Matter of Cunnion, 201 N. Y. 123, 94 N. E. 648, Richardson's Cases in Evidence, p. 892. That case, however, does not involve the question of the competency of an attorney to testify concerning the execution of a will, but is authority for the well settled rule that an attorney, who is not a subscribing witness, may not testify to the contents and preparation of a will drawn by him. In Matter of Seymour, *supra*, the Court expressed the opinion that there was no authority in our own state courts which would prohibit the testimony of an attorney to facts connected with the execution of a will, but stated that he felt constrained to follow the federal authority of Butler v. Fayerweather, 91 Fed. 458. It should be noted, however, that the Court of Appeals, per Mr. Justice Seabury, has stated that: "The statement made in the opinion in Butler v. Fayerweather, *supra*, that 'the circumstance that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place, and were aware



of the contents of the instrument, is wholly immaterial,' is not an accurate statement of the rule prevailing in this state and is not in accord with the authorities already cited." *Baumann v. Steingester*, *supra*, at p. 333.

If two or more persons consult an attorney in regard to a matter of common interest to them, nothing that is said by the parties or the attorney is deemed confidential, in an action arising subsequently thereto between the parties or their personal representatives. *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651; *Wallace v. Wallace*, 216 N. Y. 28, 109 N. E. 872; *Reitzfeld v. Harris*, 171 App. Div. 403, 157 N. Y. S. 460. But in a suit between one of the parties and a stranger, such communications are privileged. *Root v. Wright*, 84 N. Y. 72.

#### § 487. Communications Not Privileged.

It does not necessarily follow that, merely because the relationship of attorney and client exists, every communication made between them is privileged. To bring the communication within the rule, it must be a professional, as well as a confidential communication. That is, it must be for the purpose of enabling the attorney to act, as such, for the client. This qualification prevents the application of the privilege to communications made to an attorney who is acting as a business agent or real estate agent in regard to the matter entrusted to him. *Avery v. Lee*, 117 App. Div. 244, 102 N. Y. S. 12; *Lifschitz v. O'Brien*, 143 App. Div. 180, 127 N. Y. S. 1091.

An attorney may be called upon to disclose the address of a client, but this power to compel disclosure is limited to the action in which the attorney represents his client. *Matter of Malcom*, 129 App. Div. 226, 113 N. Y. S. 666; *Markovich v. Royal Ins. Co., Ltd.*, 162 App. Div. 640, 147 N. Y. S. 1004; *Hyman v. Corgil Realty Co.*, 164 App. Div. 140, 149 N. Y. S. 493. And an attorney cannot be compelled to disclose the identity of a client, where it is sought to connect the client with certain transactions. *Matter of Shawmut Mining Company*, 94 App. Div. 156, 87 N. Y. S. 1059.

An attorney cannot be required to state his opinion as to the genuineness of a client's signature where it appears that his knowledge of the handwriting in question was derived solely from communications made to him by his client during the period of his retainer. *Johnson v. Daverne*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198. But, in the language of the Court, in the case last cited, at p. 135: "If he became acquainted with his client's signature, in any other manner, though it was subsequent to his retainer, he was bound to answer; for an attorney and counsel may be questioned, as to a collateral fact within his knowledge, or as to a fact which he may know, without being entrusted with it as an attorney in the cause." See, also, *Thomson v. Perkins*, 39 App. Div. 656, 57 N. Y. S. 810.

The attorney may also be called upon to disclose the existence and place of custody of papers entrusted to him, for the purpose of enabling the adverse party to sustain a notice to produce them. *Jackson v. McVey*, 18 Johns. (N. Y.) 330; *Wakeman v. Bailey*, 3 Barb. Ch. (N. Y.) 482; *Dunn v. New York Edison Co.*, 46 Misc. 602, 92 N. Y. S. 787. And an attorney can be compelled to produce any papers of his client in his possession which the client could be compelled to produce. *Jones v. Reilly*, 174 N. Y. 97, 66 N. E. 649.

It is the province of the court to determine whether a communication is privileged. *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486.

#### § 488. Consultation for Unlawful Purpose.

Where the communication is made to an attorney by a client for the purpose of being guided or advised in the commission of a crime or the perpetration of a fraud, the client cannot claim the privilege, for the reason that it is not within the scope of the attorney's profession to give advice upon such subjects. But if the crime or fraud has already been committed, the client may seek the advice of his attorney with regard to it, and all confidential communications which he makes for this purpose will be fully protected, for the reason that it is a part of the duty of an

attorney to advise and defend those who are charged with crime, and it is essential, in order that the attorney may properly advise and represent his client, that the client shall feel free to communicate to his attorney all of the facts within his knowledge. *Standard Fire Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S. W. 411, annotated 5 A. L. R. 972; *People v. Petersen*, 60 App. Div. 118, 69 N. Y. S. 941; *Gebhardt v. United Railways Co.*, 220 S. W. (Mo.) 677, 9 A. L. R. 1076.

**§ 489. Communications Overheard by Others.**

Where a communication between an attorney and his client, which they intended to be private and confidential, is overheard by a third person, such person may be compelled to testify to what he overheard. This is upon the theory that the communication itself is not incompetent, but merely that the attorney himself is an incompetent witness as to such matter. *Hoy v. Morris*, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *State v. Loponio*, 85 N. J. L. 357, 88 Atl. 1045, 49 L. R. A. (N. S.) 1017.

**§ 490. Rule in Actions between Attorney and Client.**

Where an attorney sues his client for professional services, the attorney may testify fully as to his employment and the nature and extent of the services rendered. Such testimony will be limited, however, to those facts which are essential to preserve the rights of the attorney. *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Keck v. Bode*, 23 Ohio C. C. 413. This rule extends to all cases in which the attorney is himself a party to the transaction in question and in which it appears that the testimony is necessary in order to protect his right. *Strickland v. Capital City Mills*, 74 S. C. 16, 54 S. E. 220, annotated 7 L. R. A. (N. S.) 426.

**COMMUNICATIONS BETWEEN CLERGYMAN AND PENITENT**

**§ 491. No Privilege at Common Law.**

The common law recognizes no privilege in the case of confidential communications or confessions made to clergy-

men or other spiritual advisors. Chamberlayne's Modern Law of Ev., Vol. V., sec. 3696; L. R. A. 1917D 278, note.

**§ 492. Privilege by Statute.**

In New York the privilege is, by statute, extended to confessions made to a clergyman or priest in his professional character. The Civil Practice Act, sec. 351, provides:

"A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs."

Under a similar statute in Iowa, elders of the Presbyterian Church were held to be ministers of the Gospel because the power of discipline was conferred on them by the rules of their denomination. *Reutkemeier v. Nolte*, 179 Iowa 342, 161 N. W. 290, annotated L. R. A. 1917D 273.

The privilege extends only to confessions made in the course of discipline enjoined by the church. All other admissions or statements are admissible. *People v. Gates*, 13 Wend. (N. Y.) 311; *Alford v. Johnson*, 103 Ark. 236, 146 S. W. 516.

The privilege remains forever unless expressly waived by the penitent, as prescribed in the Civil Practice Act, sec. 354.

**COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT**

**§ 493. No Privilege at Common Law.**

At common law, communications made by a patient to his physician for the purpose of receiving medical treatment, even though made in strictest confidence, were not privileged. Chamberlayne's Modern Law of Ev., Vol. V., sec. 3701.

**§ 494. Privilege by Statute.**

By statute, in New York, physicians are forbidden, against the will of their patients, to make disclosures of in-

formation acquired in their professional capacity. The Civil Practice Act, sec. 352, provides:

"A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry."

#### **§ 495. The Reason of the Statute.**

The reasons which early (1828) induced the New York legislature to declare in favor of the privilege are clearly stated, in *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, at p. 194, as follows:

"It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship."

#### **§ 496. Relation of Physician and Patient Must Exist.**

That the privilege may be claimed under the statute, the relation of physician and patient must exist. *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951.

To illustrate: In an action for negligence in running over a boy, a doctor in the employ of the defendant, who visited the boy in the hospital, not for the purpose of treating him, but in order to ascertain the extent of his injuries, was held competent to testify to conversations with the boy,



on the ground that it did not appear that any relation of physician and patient existed. *Griffiths v. Metropolitan Street Ry. Co.*, 171 N. Y. 106, 63 N. E. 808, *Richardson's Cases in Evidence*, p. 858. Similarly in a criminal case, a physician who examines a prisoner, at the request of the district attorney, for the purpose of testifying on the question of the prisoner's sanity, is competent to testify to any information gained as a result of the examination, since no relation of physician and patient exists. *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150; *People v. Hoch*, 150 N. Y. 291, 302, 44 N. E. 976. In *Kelly v. Dykes*, 174 App. Div. 786, 161 N. Y. S. 551, it was held error to refuse to permit the defendant to question a physician upon whom the plaintiff had called a few days before trial for the purpose of showing that the visit was not for the purpose of medical treatment, but was for the purpose of ascertaining what testimony the physician would give, if called as a witness. The true test for determining whether the relation exists seems to lie in the fact of professional advice or treatment. If a doctor attends in his professional capacity for the purpose of giving medical advice and aid, it is enough to bring the case within the statute. *Meyer v. Knights of Pythias*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, *Richardson's Cases in Evidence*, p. 866.

The payment of a fee is not essential to the relationship. A free patient is entitled to the full protection of the statute. *Bauch v. Schultz*, 109 Misc. 548, 551, 180 N. Y. S. 188.

#### § 497. Employment by Patient not Necessary.

It is not necessary, however, in order to bring the testimony of the physician within the privilege, that he should have been employed by the patient. The privilege attaches equally whether the physician was called by the patient himself, by a member of his family, by another physician, or by an utter stranger, provided he attends for the purpose of giving professional aid and advice for the benefit of the patient. The fact that the patient was unconscious and unaware of the physician's presence would be immaterial.

The privileged relationship exists even though the employment of the physician was against the will of the patient. *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320; *Meyer v. Knights of Pythias*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, *Richardson's Cases in Evidence*, p. 866. To illustrate: In *Meyer v. Knights of Pythias*, *supra*, a bellboy in a hotel summoned a physician to attend a guest who had eaten "Rough on Rats" for the purpose of committing suicide. The doctor was held incompetent to testify to any information gained while treating the patient, although the latter, with curses, ordered him from the room.

**§ 498. Person Consulted Must Be Physician.**

To exclude the testimony, it must be shown that the physician was duly authorized to practice physic or surgery. Thus, information acquired by a druggist or his clerk is not privileged. *Weil v. Cowles*, 45 Hun 307, 12 N. Y. St. Rep. 427.

But the mere fact that the physician had failed or neglected to register his license is immaterial. *McGillicuddy v. Farmers' L. & T. Co.*, 26 Misc. 55, 55 N. Y. S. 242. In the language of the Court, in the case last cited, at p. 58: "Notwithstanding the changes in the law determining who may or may not practice, the section of the Revised Statutes, as a rule of evidence, has continued since 1830 to the present day, applicable to every person licensed as a physician, no matter what school of medicine he follows, or under what law he is permitted to practice, nor whether he has incurred penal responsibility personal to himself by the infraction of registration statutes or the like." Where the authority of the physician to practice is not raised at the trial, the courts, on appeal, indulge in a presumption that he had the license which the law requires to entitle him to practice. *Record v. Village of Saratoga Springs*, 46 Hun 448, *aff'd* 120 N. Y. 646, 24 N. E. 1102.

"A person duly authorized to practice physic or surgery" does not include a dentist. *Howe v. Regensburg*, 75 Misc. 132, 132 N. Y. S. 837.

A nurse in attendance is fully competent to testify unless she is a "professional or registered nurse." *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390.

**§ 499. What Matters are Privileged.**

The prohibition against a physician's disclosure of information acquired while attending a patient embraces any information so acquired, whether from examination, observation, or statements made by the patient, as well as statements made by others present at the time. *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185, 194; *Prader v. Nat. Masonic Accident Assn.*, 95 Iowa 149, 63 N. W. 601. What a physician sees by looking upon his patient is as much within the privilege of professional information as what he learns by hearing. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 286, 44 Am. Rep. 372, *Richardson's Cases in Evidence*, p. 625.

**§ 500. Information Necessary for Treatment.**

The privilege is very generally restricted to information necessary to enable the physician to prescribe for or treat his patient. *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Green v. Metropolitan Street Ry. Co.*, 171 N. Y. 201, 63 N. E. 958, 89 Am. St. Rep. 807. To illustrate: In *Green v. Metropolitan Street Ry. Co.*, *supra*, an ambulance surgeon was held competent to testify to what the injured persons told him as to how the accident happened, on the ground that such information was unnecessary for any purpose of surgical treatment. But information obtained as a necessary incident of investigations made to enable a physician to properly diagnose and treat a case is privileged. *Nelson v. Village of Oneida*, 156 N. Y. 219, 50 N. E. 802, 66 Am. St. Rep. 556. For example, in the case last cited, a physician was held incompetent to testify that, while attending his patient at childbirth, he discovered that she had an umbilical hernia, although he did not treat her for it and the knowledge was of no assistance to him in caring for his patient. The testimony was excluded on the ground that

the very nature of the physician's employment compelled this disclosure to him by the patient.

A physician is not prohibited from testifying to such ordinary incidents and facts as are plain to the observation of any one without professional knowledge. He may, for example, testify that he attended a certain person professionally on certain dates and that the patient was ill. *Patten v. United Life & Accident Ins. Assn.*, 133 N. Y. 450, 31 N. E. 342; *Klein v. Prudential Ins. Co.*, 221 N. Y. 449, 117 N. E. 942. So, too, he may testify that he performed an operation on a certain person at a certain time, although he would not be permitted to describe the operation or any condition which was necessarily disclosed by an inspection of the patient's body. *Sparer v. Travelers Ins. Co.*, 185 App. Div. 861, 173 N. Y. S. 673.

#### § 501. Who May Claim Privilege.

The privilege may be claimed by the patient or his personal representatives, but is not strictly personal to them alone. Whenever it appears that the privilege is claimed as a protection to the feelings or reputation of a living patient or the memory of a deceased one, the testimony of the physician will be excluded, irrespective of whether the objection is taken by the patient, his personal representative, or a third party. For example, it has been held that the privilege may be claimed by an assignee of a cause of action. *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185, 196. And, where an insurance company sought to establish a breach of warranty by the insured, physicians were held incompetent to testify to the fact that two aunts of the insured died of tuberculosis. *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891, *Richardson's Cases in Evidence*, p. 851. See, also, *Matter of Myer*, 184 N. Y. 54, 76 N. E. 920. The Appellate Division has gone so far as to hold that, where no objection is taken to the testimony of a physician, it is the duty of the court, of its own initiative, to refuse to receive the evidence. *Weil v. Weil*, 151 App. Div. 622, 136 N. Y. S. 190. It appeared in that case, however, that the patient



was not present to object to the testimony, and although there is a dictum in the opinion to the effect that the absence of the patient was of no consequence, nevertheless, if the patient had been present in court and heard the testimony without objection, his conduct would be deemed a waiver of his privilege. *People v. Bloom*, 193 N. Y. 1, 85 N. E. 824, 127 Am. St. Rep. 931, 18 L. R. A. (N. S.) 898.

### § 502. Burden of Proof.

The party claiming the privilege has the burden of establishing the necessary facts to bring the case within the statute. *People v. Koerner*, 154 N. Y. 355, 366, 48 N. E. 730; *Griffiths v. Metropolitan Street Ry. Co.*, 171 N. Y. 106, 111, 63 N. E. 808, *Richardson's Cases in Evidence*, p. 858; *Kelley v. Dykes*, 174 App. Div. 786, 161 N. Y. S. 551.

### § 503. Who May Waive Privilege.

The privilege is that of the patient, and not of the physician, and may, therefore, be waived by the patient whenever he sees fit. The Civil Practice Act, sec. 354, provides:

"The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon or a professional or registered nurse, upon a trial or examination, may disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 352 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest. . . . The



waivers herein provided for must be made in open court, on the trial of the action or proceeding, and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, prior to the trial, may stipulate for such waiver, and the same shall be sufficient therefor."

The privilege may, therefore, be waived on the trial by the patient or his personal representatives or, upon a will contest, by the executor named in the will or the surviving husband, widow, heirs or next of kin of any party in interest. *Morris v. Railway Co.*, 148 N. Y. 88, 42 N. E. 410; *Holcomb v. Harris*, 166 N. Y. 257, 59 N. E. 820; *Matter of Mele*, 94 Misc. 555, 157 N. Y. S. 669. But the statute does not permit a waiver by the personal representative as to all information acquired by a physician. Confidential communications and such facts as would tend to disgrace the memory of the patient are expressly excepted.

The privilege may also be waived by stipulation of attorneys before trial. *Clifford v. Denver & Rio Grande R. Co.*, 188 N. Y. 349, 360, 80 N. E. 1094. And, where the attorney for the patient, who is conducting the trial, expressly waives the prohibition of the statute, his waiver in open court is deemed the waiver of his client. *Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 77, 86, 23 N. E. 35, 6 L. R. A. 765.

A beneficiary under a life insurance policy has no power to waive the privilege. *Beil v. Supreme Lodge*, 80 App. Div. 609, 80 N. Y. S. 751.

#### § 504. How Privilege May Be Waived.

In New York, the statute provides that the privilege must be "expressly waived, upon the trial or examination" by the patient, and further, that the waiver must be made in open court and that "a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver." Civil Practice Act, sec. 354.

This statutory requirement nullifies waivers made by con-

tract or express stipulation by the patient prior to trial or examination. Its principal purpose is to correct the practice and resultant abuse of waivers inserted in contracts of life insurance. In *Holden v. Metropolitan Life Ins. Co.*, 165 N. Y. 13, 58 N. E. 771, the Court said, at p. 17: "The apparent purpose of that amendment (1891, Code of Civil Pro., sec. 836) was to protect parties, their representatives and successors from waivers which should be inadvertently or improperly obtained previously to the trial of an action or examination of the witness. That, in many cases, injustice had resulted from such waivers having been previously obtained by a species of fraud or duress was doubtless the reason which induced the Legislature to adopt this amendment requiring the waiver to be made in the presence and under the supervision of the court before which the trial or examination was had." See, also, *Clifford v. Denver & Rio Grande R. R. Co.*, 188 N. Y. 349, 80 N. E. 1094.

The phrase "express waiver," as interpreted by the courts, does not mean that the waiver must be formerly made, either orally or in writing. That the patient expressly waived his privilege may be implied from his conduct or from proceedings which he has taken or permitted others to take. Thus, the patient, or his personal representative, may waive the privilege by calling the physician to testify to information acquired professionally. *Holcomb v. Harris*, 166 N. Y. 257, 262, 59 N. E. 820. And, where a patient who was examined by two physicians at the same time calls one of the doctors as a witness, he thereby waives his privilege and loses his right to object to the testimony of the other doctor concerning the same facts. *Morris v. Railway Co.*, 148 N. Y. 88, 42 N. E. 410; *Capron v. Douglass*, 193 N. Y. 11, 85 N. E. 827, 20 L. R. A. (N. S.) 1003, *Richardson's Cases in Evidence*, p. 848. Recently the Appellate Division has gone one step further and held that, when a patient places his person before the jury as a basis for damages and has his condition described by one or more physicians, he thereby waives his privilege not only as to the physicians called by him, but as to any

physician who examined him at about the same time. *Dewey v. Cohoes & Lansingburgh Bridge Co.*, 170 App. Div. 117, 155 N. Y. S. 887; *Fennelly v. Schenectady Ry. Co.*, 201 App. Div. 211, 193 N. Y. S. 641.

Since the publication of the decision of the Court of Appeals, in *Capron v. Douglass*, *supra*, there has been much discussion in the courts as to the extent to which a patient waives his privilege by disclosing, either in his complaint or in his testimony, his physical condition at a particular time. *Capron v. Douglass*, *supra*, was an action for malpractice in the treatment of a fractured bone. The plaintiff, both in his complaint and in his testimony, described in detail how the fractures occurred and how they were treated, his pain and suffering and, so far as possible, the particulars of the operation performed on him. The Court said, at p. 17: "He, himself, has, therefore, given to the public the full details of his case, thereby disclosing the secrets which the statute was designed to protect, thus removing it from the operation of the statute. In other words, he has waived in open court upon the trial all information which he might have kept secret, by disclosing it himself." Since that case was decided the question before the courts has been how far the patient must go in the matter of disclosing his physical condition at a given time in order to waive his privilege. In *Bauch v. Schultz*, 109 Misc. 548, 180 N. Y. S. 188, Mr. Justice Guy pointed out that if, by merely testifying to the extent of the injuries received and to his previous condition of health, the plaintiff, in a negligence action, thereby waives all of his privileges under the statute, the effect would be to nullify the statute. That, however, appears to be the effect of the most recent decision of the Court of Appeals on the subject. In *Hethier v. Johns*, 233 N. Y. 370, 135 N. E. 603, the Court stated the rule as follows: "Where the plaintiff in an action brought to recover damages for personal injuries caused by the negligence of the defendant describes these injuries and their results and it appears that he has consulted or been treated by a physician in regard to them he waives the protection of the Civil

Practice Act, sec. 352. The physician may then be called by the defendant and examined as to any information acquired by him in the course of such consultation or treatment. The rule as it was formerly understood was altered by our decision in *Capron v. Douglass*, *supra*. We there took the position that where the patient tenders to the jury the issue as to his physical condition it must in fairness and justice be held that he has himself waived the obligation of secrecy which would otherwise exist."

It has been held that by bringing an action against his physician for malpractice the patient waives his privilege with respect to the condition which is the subject of the action, so that he cannot object to the physician's testimony pertaining thereto. *Terrier v. Dare*, 146 App. Div. 375, 131 N. Y. S. 51.

Where the patient fails to object to the admission of testimony of his physician, when offered by his opponent, he thereby waives his privilege. *People v. Bloom*, 193 N. Y. 1, 85 N. E. 824, 127 Am. St. Rep. 931, 18 L. R. A. (N. S.) 898. But in *Weil v. Weil*, 151 App. Div. 622, 136 N. Y. S. 190, where the patient was not present to object to the testimony, the Appellate Division held that the Court should have refused to receive the testimony, saying, at p. 623: "It is of no consequence that the defendant was not present to object to the evidence. The Code does not provide that such evidence may be received if not objected to. The prohibition is absolute that the physician shall not be allowed to testify and it remains effective unless the provisions are expressly waived on the trial by the patient."

The patient cannot be held to have waived his privilege by reason of any testimony which is forced out of him by his opponent on cross-examination. *Murphy v. N. Y., N. H. & H. R. R. Co.*, 171 App. Div. 599, 157 N. Y. S. 962.

**§ 505. Privilege Once Waived is Waived for All Time and Purposes.**

"When a waiver is once made it is general and not special, and its effect cannot properly be limited to a particular pur-



pose or a particular person. After the information has once been made public no further injury can be inflicted upon such rights and interests of the patient as the statute was intended to protect, by its repetition at another time or by another person." *Morris v. Railway Co.*, 148 N. Y. 88, 93, 42 N. E. 410. Therefore, when a patient has called his physician as a witness, he cannot object to his testifying to the same facts upon a subsequent trial. *McKinney v. Grand St., P. P. & F. R. R. Co.*, 104 N. Y. 352, 10 N. E. 544. And when a patient fails to object when his physician is called as a witness by his opponent, he thereby waives the privilege with respect to all information disclosed at that time, not only in that action, but in all future actions, civil or criminal. *People v. Bloom*, 193 N. Y. 1, 85 N. E. 824, 18 L. R. A. (N. S.) 898. So, too, where a patient has once waived his privilege by introducing his physician's testimony as to his condition at a given time, he cannot again claim the benefit of the privilege for the purpose of excluding other testimony by the same physician as to the development and progress of the same condition at a subsequent date. *Powers v. Metropolitan Street Ry. Co.*, 105 App. Div. 358, 94 N. Y. S. 184, *Richardson's Cases in Evidence*, p. 863; *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. S. 221. Nor can he object to testimony by the same physician as to his condition prior to the time in question. *Marquardt v. Brooklyn Heights R. R. Co.*, 126 App. Div. 272, 110 N. Y. S. 657; *McKenney v. American Locomotive Co.*, 164 App. Div. 625, 149 N. Y. S. 826.

### § 506. Statute Applies to All Forms of Action.

The Civil Practice Act, sec. 352, applies to all forms of action, civil and criminal. In holding this section applicable to testamentary cases, the Court said, in *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320, at p. 579: "There is just as much reason for applying it to such cases as to any other, and the broad and sweeping language of the two sections cannot be so limited as to exclude such cases from their operation. There is no more reason for allowing the



secret ailments of a patient to be brought to light in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry." A physician may not go into particulars as to his patient's condition, even in an action to recover for his services. *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390.

### § 507. Rule in Criminal Prosecutions.

The privilege may not be invoked, however, solely to shield a murderer or other criminal, where it appears that it is not at all for the benefit of the patient. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, *Richardson's Cases in Evidence*, p. 869; *People v. Harris*, 136 N. Y. 423, 448, 33 N. E. 65. To illustrate: In *Pierson v. People*, *supra*, a defendant, charged with murder by arsenical poisoning, objected to the testimony of a physician who had been called to attend the victim of the crime and whose testimony was offered by the prosecution to prove the cause of death. The objection was properly overruled on the ground that the plain purpose of the statute was "to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead," and that it was never intended to serve as a shield to murderers. But upon a prosecution for abortion, testimony of a physician who examined the victim of the crime subsequent to its commission, was excluded on the ground that the disclosure which would tend to convict the prisoner would also tend to convict the living patient of a crime as well as cast disgrace upon her. *People v. Murphy*, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661. The general rule is, therefore, that the Civil Practice Act, sec. 352, cannot be invoked to exclude the testimony of a physician where the death of the patient is the subject of a criminal prosecution, although the statute does apply to protect a living patient upon whom a crime is charged to have been committed. *People v. Brecht*, 120 App. Div. 769, 105 N. Y. S.

436, aff'd 192 N. Y. 581, 85 N. E. 1114. But where the patient is a child under sixteen and the information acquired by the physician indicates that the patient has been the victim or subject of a crime, the physician or nurses may be required to testify fully upon the prosecution for the crime. Civil Practice Act, sec. 352.

#### COMMUNICATIONS BETWEEN HUSBAND AND WIFE

##### § 508. Privilege at Common Law.

At common law the husband or wife of a party to the action was totally disqualified as a witness. *Davis v. Dinwoody*, 4 Durn. & E. (T. R.) 678, 100 Eng. Rep. 1241. Independent of this rule of disqualification, confidential communications between husband and wife were protected under the common law, so that neither spouse was permitted to testify to such communications without the consent of both, even in actions to which neither was a party. *Greenleaf on Ev.*, 16th Ed., sec. 254. The disqualification of a person as a witness by reason of being the husband or wife of a party to the action has been removed by statute in most jurisdictions, but confidential communications between husband and wife are still recognized generally as privileged from disclosure without the consent of both.

##### § 509. Reason for the Privilege.

The policy of the privilege is well stated, in *Stillman v. Stillman*, 115 Misc. 106, 187 N. Y. S. 383, at p. 107: "Communications and transactions between husband and wife were early recognized as privileged and neither could be compelled to disclose what took place between them and neither was a competent witness to testify as to such transactions or communications of a confidential nature or induced by the marital relations. From experience it was found that far less evil would result from the exclusion of such testimony than from its admission. It may in individual cases work hardship, but the destruction of confidence between a husband and wife would cause much misery and

affect the marriage relation. This rule is founded upon sound public policy. Those living in the marriage relation should not be compelled or allowed to betray the mutual trust and confidence which such relation implies."

### § 510. Privilege by Statute.

The right of the husband or wife to testify for or against each other is now regulated by statute in New York. Their absolute disqualification under the common law, as witness for or against each other, has, with but few exceptions, been so modified as to permit them to testify to matters not involving confidential communications, and even as to such matters, either may, with consent of the other, make disclosures, but cannot be compelled to do so. But their incompetency to testify against each other in divorce actions, except to prove the marriage or to disprove the accusation or the defenses thereto, still remains. So, too, in actions for criminal conversation the wife cannot testify for her husband.

The rule as to non-disclosures of confidential communications is the same in both criminal and civil cases.

The Civil Practice Act, sec. 346, provides that, except as otherwise specially prescribed, no person shall be deemed incompetent as a witness because he or she is the husband or wife of a party to the action.

The Civil Practice Act, sec. 349, provides: "A husband or wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section 1153 of this act, the other party is competent to testify in disproof of any such defense.

A husband or wife shall not be compelled, or without consent of the other if living, allowed to disclose a confidential communication, made by one to the other during

marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff."

The effect of these sections is to remove the common law disqualification and to render a husband or wife competent to testify either for or against the other, with the following exceptions:

I. In divorce actions neither may testify against the other, except

- a. to prove the marriage;
- b. to disprove the allegation of adultery; or
- c. to disprove any of the following defenses:
  1. connivance,
  2. forgiveness,
  3. statute of limitations,
  4. adultery of plaintiff. (See Civil Practice Act, sec. 1153.)

II. In an action for criminal conversation, the plaintiff's wife may not testify for the plaintiff although she may testify for the defendant. Civil Practice Act, sec. 349; *Botwinick v. Annenberg*, 204 App. Div. 436, 198 N. Y. S. 151.

III. Neither may testify to a confidential communication made during marriage, without the consent of the other.

In divorce actions, the courts are most strict in enforcing the statutory prohibition against allowing either spouse to testify against the other except as to those matters which are expressly excepted in the statute. *Colwell v. Colwell*, 14 App. Div. 80, 43 N. Y. S. 439; *Budd v. Budd*, 55 App. Div. 113, 67 N. Y. S. 43; *Taylor v. Taylor*, 123 App. Div. 220, 108 N. Y. S. 428. For example, a wife may not testify to the fact of her residence in order to establish jurisdiction. *Dickinson v. Dickinson*, 63 Hun 516, 18 N. Y. S. 485. Nor may she testify against her husband concerning his property and income. *Valentine v. Valentine*, 87 App. Div. 156, 84 N. Y. S. 37.

The Penal Law, sec. 2445, provides:

"The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage."

This section entirely removes the common law disqualification by making either husband or wife competent to testify for or against each other. Its only limitation is that neither can be compelled without consent of the other to disclose a confidential communication made by one to the other during marriage. *People v. Lewis*, 62 Hun 622, 16 N. Y. S. 881, aff'd 136 N. Y. 633, 32 N. E. 1014.

A single exception is created by statute. The Penal Law, sec. 480, provides that upon a prosecution for abandonment of a child in destitute circumstances, the provisions of section 2445 prohibiting the disclosure of confidential communications between husband and wife shall not apply.

### § 511. What are Confidential Communications.

Confidential communications are those that "are expressly made confidential, or such as are of a confidential nature or induced by the marital relation." *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, *Richardson's Cases in Evidence*, p. 875. To illustrate: In an action for libel in suggesting that the plaintiff had had illicit relations with one C, the husband of the plaintiff was called as a witness by the defendant and asked if he had had any conversation with his wife in relation to C. He was held incompetent to answer, since the question called for the disclosure of a confidential communication. The Court said: "It cannot be supposed that both husband and wife would have been willing to discuss such a subject in the presence of other persons, or would have consented to a repetition of the conversation by either party to it. Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no



occasion to exact." *Warner v. Press Pub. Co.*, 132 N. Y. 181, 186, 30 N. E. 393, *Richardson's Cases in Evidence*, p. 872. See, also, *Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. S. 163.

Statements made by a husband to his wife as to his family's attitude toward his wife and explaining why they should keep the marriage secret, involve confidential communications between husband and wife. *Cochran v. Cochran*, 196 N. Y. 86, 89 N. E. 470, *Richardson's Cases in Evidence*, p. 879.

Not all communications between husband and wife are confidential, however. For example, ordinary conversations or letters relating to matters of business are not regarded as confidential. *Parkhurst v. Berdell*, *supra*. To illustrate: A letter from a husband to his wife in which he chronicled the weather, his daily doings and his efforts to find a summer place for the family and, incidentally, acknowledged a debt which he owed to his wife's mother, was held not to be a confidential communication within the inhibition of the statute. *Norris v. Lee*, 136 App. Div. 685, 121 N. Y. S. 512. In an action for the alienation of a wife's affections, it was held that the wife might testify that her husband had used abusive and profane language to her and accused her of adultery, as such treatment did not constitute confidential communications. *Millspaugh v. Potter*, 62 App. Div. 521, 71 N. Y. S. 134. In *Sheldon v. Sheldon*, 146 App. Div. 430, 131 N. Y. S. 291, where it appeared that the husband was a physician, advice given to his wife as a patient was held not to be a confidential communication induced by the marital relation. And, in a criminal prosecution against the husband for murder, a wife was compelled to testify that her husband, while in jail, had secretly persuaded her to mail letters for him, since the mere act of mailing letters at the request of her husband did not involve a confidential communication. *People v. Truck*, 170 N. Y. 203, 212, 63 N. E. 281.

In some jurisdictions all private communications between

husband and wife are privileged. *Dexter v. Booth*, 2 Allen (Mass.) 559.

**§ 512. Presence of Third Persons.**

Communications or conversations between husband and wife in the presence of a third person are deemed not to be confidential, and, therefore, husband, wife, or third person may testify to such communications. *People v. Lewis*, 62 Hun 622, 16 N. Y. S. 881, *aff'd* 136 N. Y. 633, 32 N. E. 1014.

**§ 513. Confidential Communications Overheard by Third Persons.**

Since the statutory prohibition is directed only against the competency of a husband or wife to testify and not against the admissibility in evidence of the confidential communication, any third person who overhears a confidential communication between husband and wife may testify to it. *Commonwealth v. Griffin*, 110 Mass. 181. See, also, *People v. Hayes*, 140 N. Y. 484, 496, 35 N. E. 951, 23 L. R. A. 830.

**§ 514. Written Communications Privileged.**

Letters between husband and wife are as much within the protection of the rule as are oral communications. *Bowman v. Patrick*, 32 Fed. 368; *Hopkins v. Grimshaw*, 165 U. S. 342, 41 Law. Ed. 738, 17 Sup. Ct. Rep. 401; *Stillman v. Stillman*, 115 Misc. 106, 187 N. Y. S. 383.

**§ 515. Written Communications Acquired by Third Persons.**

It has been held in New York that "when the husband or wife, to whom a written confidential communication is addressed, makes it public by giving it to another, the confidential character of the communication as against such party has departed and it may be treated like any other communication and put in evidence if otherwise admissible." *People v. Hayes*, 140 N. Y. 484, 496, 35 N. E. 951, 23 L. R. A. 830. In that case, letters written by the wife to the hus-

band and given by him to his mistress were held admissible in a prosecution against the husband for perjury, although they would undoubtedly not have been admitted against the wife for any purpose. Cases are collated and distinguished in an Editorial, *New York Law Journal*, March 16, 1928.

Wigmore on Evidence, sec. 2339, says that, while a third person overhearing a confidential communication may testify to it, yet, as to documents, letters, etc., coming into the possession of a third person, "a distinction should obtain; *i. e.*, if they were obtained from the addressee by voluntary delivery, they should still be privileged, (for otherwise the privilege could by collusion be practically nullified for written communications); but if they were obtained surreptitiously or otherwise without addressee's consent, the privilege should cease." Thus, in *Commonwealth v. Fisher*, 221 Pa. 538, 70 Atl. 865, it was held that, where a prisoner charged with murder dictates letters to his wife, which are duly mailed to her, and are subsequently delivered by her to the district attorney, they are inadmissible in evidence, as their reception would amount, substantially, to permitting a wife to testify against her husband, in violation of his statutory privilege.

But in *O'Toole v. Ohio German Fire Ins. Co.*, 159 Mich. 187, 123 N. W. 795, the Court held that, where letters written by a wife to her husband were found in a room occupied by him, under circumstances indicating that they had dropped from his clothing to the floor, and from the finder, who occupied no confidential relation to either spouse, they came indirectly into the possession of defendant in a suit by the wife, there being no collusion between the husband and the finder or the husband and defendant, the letters were admissible in evidence. On this point the Court said:

"The privilege is in derogation of the general rule that all persons may be compelled to testify concerning facts inquired about in courts of justice. It should be made effective, but ought not to be extended by the courts to cases where there has been no injury to the relation of the parties by the betrayal of the confidence reposed. And so

it has been held, and we think correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating or the custody or control of their agents or representatives, it is not privileged. The communication being offered by some one other than the parties thereto, courts have in some instances refused to inquire as to the manner in which it was obtained. The cases are not numerous; the rulings are not harmonious. Some of them are collected in 23 A. & Eng. Ency. of Law, p. 95. Precisely in point is *State v. Mathers*, 64 Vt. 101, 23 Atl. 590, 15 L. R. A. 268, 33 Am. St. Rep. 921."

#### § 516. Waiver of Privilege.

In some jurisdictions the privilege may be waived by the one who has made the communication, but in New York the privilege belongs to both husband and wife, and an objection by either to a disclosure of a confidential communication should be sustained. The concurrence of both husband and wife are necessary to effect a waiver. *People v. Wood*, 126 N. Y. 249, 271, 27 N. E. 362, *Richardson's Cases in Evidence*, p. 224.

#### § 517. How Waived.

The privilege is waived by either husband or wife going on the stand and testifying with the consent of the other, or by a failure to seasonably object to the introduction of the confidential matter. *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, *Richardson's Cases in Evidence*, p. 875. The objection should be taken on the ground that the witness is incompetent to testify to a confidential communication between husband and wife, under the Civil Practice Act, sec. 349. *Lunham v. Lunham*, 133 App. Div. 215, 117 N. Y. S. 396.

The Civil Practice Act, sec. 354, which provides for the manner of waiving privileged communications between attorney and client, clergyman and penitent, and physician

and patient, does not apply to confidential communications between husband and wife.

**§ 518. Privilege Not Lost by Termination of Relation.**

The privilege is not lost by a termination of the marital relation, whether by divorce or death of one of the parties. See authorities cited in Chamberlayne's *Modern Law of Ev.*, Vol. V., sec. 3698.

**§ 519. Communications to Public Officers.**

In addition to the privilege against disclosure which the law accords to confidential communications between the parties to the four recognized privileged relationships, there is a privilege which attaches, under certain circumstances, to communications made to public officers. State secrets, or matters which concern the administration of government, should not be disclosed, since to reveal them might be highly prejudicial to public interest. Therefore, communications relating to affairs of state are generally held to be privileged, and the officer may refuse to disclose them.

In *Howard v. Thompson*, 21 Wend. (N. Y.) 319, letters to the Secretary of the Treasury of the United States, which were relied on as containing libelous matter, were voluntarily produced, so that no question of compelling a disclosure arose, but the court said that if the letters had not been surrendered by the Secretary of the Treasury, he could not have been compelled to produce them, and secondary evidence of their contents could not have been admitted. See authorities collated and discussed in 9 A. L. R. 1099.

In *Matter of Cohen*, 105 Misc. 724, 174 N. Y. S. 427, it was held that all communications between the surrogate and his chief clerk and his stenographer arising out of the judicial work in the surrogate's chambers are privileged. The Court said, at p. 726: "Public policy demands, and it is a sound doctrine, that those standing in confidential relation with a judge of a court of record, as a clerk and stenographer with regard to statements in proceedings



pending before the court, should not be compelled or allowed to betray the trust and confidence which such relationship implies. For very obvious reasons a judge should not be compelled to state the reason of his decision, nor should he, nor his chief clerk, nor his stenographer, be compelled to give evidence as to that which transpires in the consulting room."

The weight of authority supports the rule that communications made by an informer to a prosecuting officer in good faith for the purpose of procuring an investigation of a suspected crime are privileged and may not be disclosed without the consent of the person making the communications. But communications made in bad faith for unlawful purposes are not privileged. *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982, annotated 9 A. L. R. 1091.

#### § 520. Ordinary Communications in Confidence.

The mere fact that information was communicated to a witness in confidence or under a promise of secrecy does not create a privilege. Hence, there is no privilege as to a communication made to a friend, clerk, merchant, banker, or newspaper reporter. *Greenleaf on Ev.*, 16th Ed., sec. 248.

"No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice." *Wigmore on Ev.*, sec. 2286.

## CHAPTER XXIV.

### OPINION EVIDENCE

#### § 521. Opinion Evidence Generally Inadmissible.

As a general rule witnesses must testify to facts and not to their opinions and conclusions drawn from the facts. *Morehouse v. Mathews*, 2 N. Y. 514, *Richardson's Cases in Evidence*, p. 903; *Dewitt v. Barley*, 9 N. Y. 371; *Moran v. Standard Oil Co.*, 211 N. Y. 187, 194, 105 N. E. 217. To illustrate: A witness cannot give his opinion as to whether more force was used than was necessary in removing a passenger, *Regner v. Glens Falls R. R. Co.*, 74 Hun 202, 26 N. Y. S. 625; or whether certain transactions and conversations amounted to an agreement, *Hillock v. Grape*, 111 App. Div. 720, 97 N. Y. S. 823; or as to whose negligence caused an accident, *Crofut v. Brooklyn Ferry Co.*, 36 Barb. (N. Y.) 201; or whether plaintiff was acting in a careful or careless manner, *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812, *Richardson's Cases in Evidence*, p. 905; or whether a bridge was a safe place to work, *Duncan v. Atchison, T. & S. F. Ry. Co.*, 86 Kan. 112, 119 Pac. 356; or whether the condition of a highway was dangerous, *Musick v. Borough of Latrobe*, 184 Pa. 375, 39 Atl. 226; or whether a fire was of incendiary origin, *People v. Grutz*, 212 N. Y. 72, 82, 105 N. E. 843, L. R. A. 1915D 229, *Richardson's Cases in Evidence*, p. 250; or how long a fire had been burning, *Goodman v. Caledonian Ins. Co.*, 222 N. Y. 121, 125, 118 N. E. 523. A witness would not be permitted to testify that "from looking at the front wheel of deceased's machine it looked as if he had lost control of it," as such a statement would be a sure conclusion of the witness, inadmissible to prove contributory negligence. *Zimmerman v. Ullmann*, 173 App. Div. 650, 160 N. Y. S. 81. And, upon the question of the admissibility of a dying declaration, the wife of the deceased would not be allowed to testify that she thought the deceased did not expect to die from his wounds. *State*

v. Tilghman, 33 N. C. 513. Nor would a witness be allowed to express his opinion that his pain and suffering would be permanent. *Atlanta St. R. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48. Testimony of a tenant that he has tried to find other suitable apartments is held inadmissible as a mere conclusion of the witness. *Kline v. Kleenan*, 185 N. Y. S. 113. See, also, *Blek v. Davis*, 193 App. Div. 215, 183 N. Y. S. 737. The above illustrations involve opinions on issues which are for the court or jury to determine from the facts sworn to by the witnesses.

### § 522. Exceptions to the General Rule.

The general rule excluding "opinion evidence" is subject to many very important exceptions. These exceptions admitting the opinions of witnesses may be classified into two divisions:

1. Opinions of ordinary witnesses;
2. Opinions of expert witnesses.

### § 523. Opinions of Ordinary Witnesses.

The exception under which the opinion of an ordinary witness may be received is said to rest upon the necessity of the case, for it often happens that it is quite impossible for a witness to describe in detail all the pertinent facts in such a manner as to enable a jury to form a conclusion without the opinion of the witness. An ordinary witness may, therefore, give his opinion on a question at issue whenever the facts involved are of such a nature that they cannot be described so as to enable persons, not eye witnesses, to form proper conclusions regarding them. There is no means in such cases of stating the result of the witness's observations other than the determination he came to. *Collins v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 243, 16 N. E. 50, *Richardson's Cases in Evidence*, p. 266; *Fellows v. I. R. T. Co.*, 117 Misc. 64, 190 N. Y. S. 547; *Sydleman v. Beckwith*, 43 Conn. 9; *State v. Pruett*, 22 N. M. 223, 160 Pac. 362, fully annotated L. R. A. 1918A, 656. For example, where the question is whether a red stain is blood or paint, an ordinary witness

may express his opinion that it is a blood stain, since he cannot separate and describe the facts and indications on which he based his conclusion from the conclusion itself. *People v. Fernandez*, 35 N. Y. 49; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636, *Richardson's Cases in Evidence*, p. 254; *People v. Deacons*, 109 N. Y. 374, 382, 16 N. E. 676. The subjects on which an ordinary witness may express an opinion do not require special study and skill in order to qualify him to express a conclusion. His qualification results from common ordinary knowledge. Only an expert can express an opinion on subjects requiring skill and study.

#### § 524. Illustrations.

The opinions of ordinary witnesses—those not experts—may be received as to

a. Matters of color, weight, size, quantity, light, and darkness. *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Townsend v. Brundage*, 4 Hun 264, 6 Thomp. & C. (N. Y.) 527; *Miller v. City of New York*, 104 App. Div. 33, 93 N. Y. S. 227.

b. Matters involving taste, smell and touch. For example, a witness may testify that a certain beverage which he drank was whiskey. *People v. Marx*, 128 App. Div. 828, 112 N. Y. S. 1011.

c. The state of emotion exhibited by a person; *e. g.*, whether he appeared to be angry or in fun. *Blake v. People*, 73 N. Y. 586, L. R. A. 1918A 721; 22 C. J., p. 614. But it is now settled, in New York, that a witness may not testify that two persons appeared to be attached to one another or to have a strong mutual affection. *Pearce v. Stace*, 207 N. Y. 506, 101 N. E. 434. In the case last cited, the Court said, at p. 512: "It was competent for plaintiff to show the attentions paid her by defendant, but manifestations of attachment can hardly be said to be uniform. To one individual the deportment and actions of the parties might appear as the conduct of an engaged couple; to another person the same deportment might seem but the indication of friendship \* \* \* It was for the jury to determine from

the acts and conversations of plaintiff and defendant as narrated by the witnesses the inference to be drawn therefrom, and the admission of opinions formed by others was error."

d. The general physical condition of a person. *Rawls v. Am. Mut. Life Ins. Co.*, 27 N. Y. 282.

e. Identity and likeness. The witness may be asked whether he knows a certain person, and if so, whether he is the person indicated. See authorities reviewed in *L. R. A.* 1918A 713, note. The admissibility of the testimony is not affected by the fact that the witness is unable to testify positively, although a lack of positiveness is a fact to be considered by the jury in determining the weight of the evidence. *People v. Strollo*, 191 N. Y. 42, 62, 83 N. E. 573. But a witness cannot testify to a mere impression as to the identity of a person. *People v. Williams*, 29 Hun 520. A witness may state whether a photograph or a bust is a good likeness. *Schwartz v. Wood*, 67 Hun 648, 21 N. Y. S. 1053.

f. The identification of a person by his voice. *Mack v. State*, 54 Fla. 55, 44 So. 706, annotated 13 *L. R. A.* (N. S.) 373; *Commonwealth v. Hayes*, 138 Mass. 185. Similarly, a witness may identify a dog by his bark. *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303.

The receiver or hearer of a message through the telephone may testify to the conversation, provided the person with whom the conversation was held can be identified. The question of identification presents the only real problem involved. Difficulty arises from the fact that the usual means of identification are absent. If a witness knows the speaker and recognizes his voice, all cases agree that the evidence is admissible. *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882. In that case it was held that an affidavit, upon which an attachment was issued, which stated, upon information and belief, certain facts alleged to have been admitted by the plaintiff over the telephone, was insufficient because it did not appear that the affiant was acquainted with the plaintiff or recognized his voice. See, also, *People v. Levis*, 96 Misc. 513, 529, 161 N. Y. S. 824. A witness may



testify to a telephone conversation with a person whose voice he did not know at the time but which he subsequently recognized as the voice of a speaker whom he met thereafter. Such evidence may be weak but it is, nevertheless, competent. *People v. Strollo*, *supra*; *People v. Dunbar Contracting Co.*, 215 N. Y. 416, 422, 109 N. E. 554.

A telephone conversation overheard through a connecting instrument is admissible, if the voice is recognized. *Rimes v. Carpenter*, 114 N. Y. S. 96. See, also, *People v. McDonald*, 177 App. Div. 806, 165 N. Y. S. 41. If the evidence of the recognition of the voice has been given, it is also proper to show that the person, the identity of whose voice over a telephone is questioned, answered a call which was put in for him at his usual place of business, admitted that such was his name, and showed himself familiar with the transactions inquired about. *Woodruff v. Benesch*, 112 Misc. 489, 182 N. Y. S. 880. But, in New York, the mere fact that some one answered the telephone and stated that he was the person for whom the call had been made is not sufficient. A recognition of the voice is essential. *Mankes v. Fishman*, 163 App. Div. 789, 149 N. Y. S. 228, *Richardson's Cases in Evidence*, p. 912, and authorities there cited; *Bonner Mfg. Co. v. Tannenbaum*, 169 N. Y. S. 43. In many jurisdictions, however, such identification is held sufficient. *Theisen v. Detroit Taxicab & Transfer Co.*, 200 Mich. 136, 166 N. W. 901, annotated L. R. A. 1918D 715.

g. The resemblance of footprints. *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun 90.

In admitting testimony of a witness that certain tracks in the snow resembled the footprints of one Warner, the Court said, in that case, at p. 95: "The tracks could not be presented before the referee; the fact that they had existed was a very important one in the case. The referee must get a description of the tracks from the witness who saw them, and a comparison between the tracks found in the snow and those made by Warner could only be made by the witness who saw it. A description could be given by stating the length and breadth of the tracks, and the marks

left by the sole of the boot or shoe in the snow, and whether the toes of the wearer turned in or out. But all this might fall far short of enabling the jury to determine whether there was such a resemblance in the tracks as would enable them to say they were made by the same foot. The defendants had the right to have the opinion of the witness, if it can be called an opinion, after stating to the jury the measurements made, and peculiarities discovered by him in the tracks."

h. Whether a person appeared to be intoxicated. *People v. Eastwood*, 14 N. Y. 562, *Richardson's Cases in Evidence*, p. 909; *Commonwealth v. Eyler*, 217 Pa. 512, 66 Atl. 746, 11 L. R. A. (N. S.) 639.

i. The ownership of property. Ownership is a question of fact and is to be distinguished from facts, the existence of which depends upon inferences drawn from a collection of other facts. *DeWolf v. Williams*, 69 N. Y. 621; *Pichler v. Reese*, 171 N. Y. 577, 64 N. E. 441.

j. The speed of railroad trains, trolley cars, automobiles, etc. But the witness must first show some experience in observing the rate of speed of moving objects or give some satisfactory reason or basis for his opinion. *Salter v. Utica & Black River R. R. Co.*, 59 N. Y. 631; *Garduhn v. Union Railway Co.*, 50 App. Div. 602, 64 N. Y. S. 210; *Fisher v. Union Railway Co.*, 86 App. Div. 365, 83 N. Y. S. 694; *Detroit & M. Ry. Co. v. Van Steinburg*, 17 Mich. 99, L. R. A. 1918A 701.

k. The estimated age of another person based on his appearance, as described by the witness. L. R. A. 1918A 685; *Hartshorn v. Metropolitan Life Ins. Co.*, 55 App. Div. 471, 67 N. Y. S. 13. A witness is competent to testify to his own age. *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, *Richardson's Cases in Evidence*, p. 596.

l. His own intent or belief, where that is material. Where the doing of an act is not disputed but its validity or effect depends upon the intent with which it was done, the person who did the act may testify as to what his intention was at the time. *McKown v. Hunter*, 30 N. Y. 625;

Thurston v. Cornell, 38 N. Y. 281; Davis v. Marvine, 160 N. Y. 269, 54 N. E. 704; Noonan v. Luther, 206 N. Y. 105, 99 N. E. 178, 41 L. R. A. (N. S.) 761; Kahrs v. Eygabroad, 114 Misc. 395, 186 N. Y. S. 531. But a witness may not state his own unexpressed understanding of the meaning of a contract. Dillon v. Anderson, 43 N. Y. 231. Nor may he testify to his reasons for doing certain acts for the purpose of raising an inference that the acts were done. Rimes v. Carpenter, 59 Misc. 445, 110 N. Y. S. 965. A witness will not be permitted to state his conclusion as to the intent, motive, or belief of another person. Bogart v. City of New York, 200 N. Y. 379, 384, 93 N. E. 937.

m. The rational or irrational nature of a person's conduct, as described by the witness. In New York, an ordinary (non-expert) witness may describe the acts of a person whose sanity is in question and then state whether those acts impressed him at the time as rational or irrational, but he cannot testify that the person was of sound or unsound mind, except in the case of a witness who was a subscribing witness to a will. Holcomb v. Holcomb, 95 N. Y. 316, Richardson's Cases in Evidence, p. 933; Matter of Myer, 184 N. Y. 54, 76 N. E. 920; People v. Hill, 195 N. Y. 16, 26, 87 N. E. 813. In the language of the Court, in People v. Pekarz, 185 N. Y. 470, 78 N. E. 294, at p. 481: "The general rule running through the cases from an early day is that a lay witness may describe the acts of a person whose sanity is under investigation, and then state whether those acts impressed him at the time as rational or irrational. \* \* The rule authorized the witness to characterize the acts, but not the person doing the acts. The observer may state that the act impressed him as rational, but not that the person impressed him as irrational. \* \* Whether the distinction is logical or not, it seems to be well founded. Of course, when an act is characterized as rational or irrational, it necessarily means the act of the rational or irrational human being named and for the witness to express what is necessarily implied does not change the necessary effect. On the other hand, it is to be observed that a direct

answer to the questions as asked would involve the opinion of the witness upon the question the jury were to decide, which is contrary to the general principle governing opinions of lay witnesses." See, also, recent case of *Dean v. Halliburton*, 208 App. Div. 738, 203 N. Y. S. 81. The federal rule goes further and permits the witness, in addition to describing significant instances of conduct of the person whose sanity is in question, to testify to the opinion on the mental capacity formed at the time from such observation. *Turner v. American Security & Trust Co.*, 213 U. S. 257, 53 Law. Ed. 788, 29 Sup. Ct. Rep. 420, *Richardson's Cases in Evidence*, p. 940. A subscribing witness to a will may testify to his opinion concerning the testamentary capacity of the testator as evidenced by his conduct at the time of executing the will, since he has been chosen by the testator for that purpose. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Matter of Coleman*, 111 N. Y. 220, 227, 19 N. E. 71.

n. The value of property and services, where the witness is shown to be acquainted with the value of similar things. Although a witness who qualifies as competent to express an opinion on value is frequently referred to as an expert, value is not strictly a subject for expert testimony. The distinction is expressed in *Shattuck v. Stoneham Branch R. R.*, 6 Allen (Mass.) 115, as follows: "This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of that term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety." See, also, *Clark v. Baird*, 9 N. Y. 183. The amount of knowledge that a witness must be shown to possess in order to qualify to testify to an opinion as to value is largely discretionary with the trial court. In the language



of the Court in *Teerpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279, at p. 282: "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks. Persons should be conversant with the article, and of its value in the market, as a farmer or dealer, or a person conversant with the article, as to the value of lands, cattle, produce, etc."

A witness who testifies to the value of property, real or personal, must have seen the thing in question, besides being conversant with the value of similar things. *Clark v. Baird*, *supra*. But in the case of services, a witness who is shown to be acquainted with the value of services of that nature may state that he heard the testimony concerning the services in question and may then give his opinion as to the value of the services described. *McCollum v. Seward*, 62 N. Y. 316. A witness may testify to the value of his own services. *Helmuth v. Apgar*, 17 Misc. 623, 40 N. Y. S. 651.

Opinion evidence on value must be confined to the actual value at a given time. A witness will not be permitted to state his opinion on the speculative value of property or services under different conditions from those shown to exist. For example, he may not give his opinion on the probable value of a piece of real property in case an elevated railroad had not been built in front of the premises. *Roberts v. N. Y. E. R. R. Co.*, 128 N. Y. 455, 28 N. E. 486, *Richardson's Cases in Evidence*, p. 920; *Hood v. N. Y., Westchester & Boston R. R. Co.*, 180 App. Div. 8, 167 N. Y. S. 490. In New York, a witness may not state his opinion on the amount of damages sustained, because that is the precise question to be determined by the jury. *Morehouse v. Mathews*, 2 N. Y. 514, *Richardson's Cases in Evidence*, p. 903; *Van Deusen v. Young*, 29 N. Y. 1; *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. 20.

o. The genuineness of the handwriting of another. See extensive note to *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887, in 63 L. R. A. 963. But before he can express such an



opinion he must show in what way he acquired his familiarity with the handwriting in question. There is no precise standard fixing the degree of knowledge necessary. It is sufficient if it appears that the witness

(1) Has seen the party write at least once. *Hammond v. Varian*, 54 N. Y. 398; *Matthews v. Hill*, 165 App. Div. 672, 674, 151 N. Y. S. 101; *Rideout v. Newton*, 17 N. H. 71. But a witness who could read and write only a little and who had seen the party write only once was held incompetent, in *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066, on the ground that a witness is qualified to testify to the handwriting of another only if he has an "intelligent acquaintance with the handwriting of the party so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting."

(2) Has seen writings, directly or indirectly acknowledged to be his, as for instance, a note which he paid. *Johnson v. Daverne*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 193.

(3) Has received letters or other documents, purporting to be written by him in response to his own communications. *Gross v. Sormani*, 50 App. Div. 531, 64 N. Y. S. 300; 22 C. J., p. 628.

Knowledge of the handwriting of another may be acquired otherwise than as outlined. In general, a witness is competent to testify to the genuineness of a person's handwriting if it appears that he has become familiar with the handwriting in question in any way that would enable him to recognize it with a reasonable degree of certainty. 63 L. R. A. 974.

It has been held that a witness who has derived his knowledge of the handwriting in question solely from an inspection of family correspondence, in which the witness had no part but which was recognized in the family as genuine, is qualified to express an opinion. *Johnston v. Bee*, 84 W. Va. 532, 100 S. E. 486, annotated 7 A. L. R. 252.

If it appears that the knowledge was acquired *post litem motam* for the purpose of the suit, the witness is incompetent to express an opinion. *Hynes v. McDermott*, 82

N. Y. 41, 37 Am. Rep. 538, 63 L. R. A. 978, note. After showing knowledge of the handwriting, the witness may express his opinion or belief as to its genuineness even though he is not positive. 22 C. J., p. 630.

### § 525. Negative Inferences.

The authorities are in irreconcilable conflict on the question of the extent to which a witness will be allowed to testify to his opinion that a certain happening did not or could not take place, based on his observation of the conditions. L. R. A. 1918A 743, note. The question arises most frequently in negligence cases where it is sought to prove that whistles were not blown, horns were not sounded, etc. In New York, it has been held proper to permit a witness to testify that from the place where he was located, he could have heard the bell or whistle of a train if it had sounded. *Renwick v. N. Y. C. R. R. Co.*, 36 N. Y. 132, *Richardson's Cases in Evidence*, p. 952; *Stever v. N. Y. C. & H. R. R. Co.*, 7 App. Div. 392, 39 N. Y. S. 944. In the case last cited, the Court said, at p. 399: "This, it seems to us, called for something more than the mere expression of an opinion, for the answer involved the statement of a fact, about which the witness, by reason of his experience or the knowledge which he possessed as to the acuteness of his faculties, was more competent to speak than anyone else, and, therefore, it was one to which the plaintiff was clearly entitled." See, also, *Kohlhagen v. Cardwell*, 93 Or. 610, 184 Pac. 261, 8 A. L. R. 11. But testimony of a witness that a person, not himself, sitting at a table in a certain room could not hear a conversation had on the porch was held inadmissible, in *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081.

### § 526. Recapitulation of Opinion Evidence of Ordinary Witnesses.

In *Hardy v. Merrill*, 56 N. H. 227, the Court summarizes the cases in which the opinions of ordinary witnesses may be received as follows:

"Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons especially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. . . . Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained."

### § 527. Opinions of Expert Witnesses.

The ground for the admission of expert opinion evidence is necessity. The administration of justice requires that, under proper limitations, a jury should receive the assistance of those especially qualified by experience and study to express an opinion on questions of fact relating to art, science or trade. The rule has been stated by the New York Court of Appeals as follows: "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are primarily within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn

from the facts stated as well as knowledge of the facts themselves depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases, not only the facts, but the conclusions to which they lead, may be testified to by qualified experts." *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, *Richardson's Cases in Evidence*, p. 954; Editorial, *New York Law Journal*, March 17, 1927.

In the one instance, the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion, which may be accepted or rejected by the jury. To illustrate: In *Dougherty v. Milliken*, *supra*, in which expert testimony was offered to show negligence in the construction of a derrick, it was held that men skilled in the construction and use of derricks might properly testify to the manner of construction and the amount and kind of strain to which the apparatus was subjected, but that, with these facts before it, a jury of average intelligence could form a conclusion as to the safety of the method of construction employed, and that, therefore, expert witnesses should not be allowed to express an opinion on that question. Similarly, in *Noah v. Bowery Savings Bank*, 225 N. Y. 284, 122 N. E. 235, it was held that, upon the question of the negligence of the defendant bank in honoring a forged draft, an expert familiar with the savings bank business might testify to the usual method of dealing with signatures, but that such a witness should not be permitted to express his opinion that a slight change in the spelling of the depositor's name would not tend to excite suspicion in the mind of an ordinarily competent signature clerk, since a jury of average intelligence was competent to form a proper conclusion from the evidence. See, also, *People v. Polstein*, 184 App. Div. 260, 171 N. Y. S. 501, *aff'd* 226 N. Y. 593, 123 N. E. 882. In all cases in which the facts can be placed before the jury by any witness, skilled or unskilled, who is capable of describing them accurately, so that a jury of average intelligence and training can un-



derstand them and form a proper conclusion based on them, expert opinion evidence is inadmissible.

The mere fact that one person may know more about a subject than another is not sufficient to warrant an expression of opinion. *Ferguson v. Hubbell*, 97 N. Y. 507, *Richardson's Cases in Evidence*, p. 959. For example, so-called experts would not be permitted to express an opinion as to how many men would be required in order to erect a telephone pole with safety, *Hall v. N. Y. Telephone Co.*, 168 App. Div. 396, 153 N. Y. S. 22; or whether a slight spreading of the railroad track and a worn condition of the front wheel of the car might cause a derailment, *Schutz v. Union Ry. Co.*, 181 N. Y. 33, 73 N. E. 491; or whether there is greater danger in running three boards through a saw than one, *Carron v. Standard Refrigerator Co.*, 122 App. Div. 296, 300, 106 N. Y. S. 723; or whether a bullet wound was self inflicted, *People v. Creasy*, 236 N. Y. 205, 140 N. E. 563. See, also, *Welle v. Celluloid Co.*, 186 N. Y. 319, 79 N. E. 6; *Spokane & I. E. R. R. Co. v. United States*, 241 U. S. 344, 60 Law. Ed. 1037, 36 Sup. Ct. Rep. 668; *Ferdon v. New York, Ontario & Western R. R. Co.*, 131 App. Div. 380, 386, 115 N. Y. S. 352.

But where the subject matter is of such a technical nature that the proper conclusion to be drawn from the facts depends upon professional or scientific knowledge or skill, qualified experts may express their opinion as to the proper inference to be drawn from a given set of facts, as an aid to the jury in reaching their own conclusion in the case before them. In *Mayor v. Pentz*, 24 Wend. (N. Y.) 668, the Court reasoned as follows: "Indeed it would be more logically accurate to say that mere opinion, even of men, professional or expert, is not admissible as such; but that facts having been proved, men skilled in such matters may be admitted to prove the existence of other more general facts or laws of nature, or the course of business, as the case may be, so as to enable the jury to form an inference for themselves. Thus, the existence of certain appearances in the dead body having been proved, the chemist testifies that



such appearances invariably or generally indicate the operation of some powerful chemical agent. His scientific opinion is in fact his testimony to a law of nature." Expert opinion evidence of this character is most frequently admitted upon subjects requiring a knowledge of medicine or surgery but is by no means limited to that class of cases. For example, experts may testify to their opinions upon questions involving nautical skill, *Eastern Transportation Line v. Hope*, 95 U. S. 297, 24 Law. Ed. 477; an understanding of complicated machinery, *Swarts v. Wilson Mfg. Co.*, 115 App. Div. 739, 100 N. Y. S. 1054, *aff'd* 193 N. Y. 623, 86 N. E. 1133; a knowledge of electrical engineering, *German Am. Ins. Co. v. N. Y. Gas & El. Co.*, 103 App. Div. 310, 93 N. Y. S. 46, *aff'd* 185 N. Y. 581, 78 N. E. 1103.

### § 528. Qualifications of Experts.

The qualification of a witness to testify as an expert is a preliminary question for the court and is not, ordinarily, subject to review. *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App. Div. 366, 94 N. Y. S. 241; *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802; *Sloan v. Baird*, 162 N. Y. 327, 333, 56 N. E. 752. See, also, *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266.

There is no definite rule prescribed as to how the skill and experience of an expert witness must be acquired. The witness may be qualified to speak from actual experience or observation, or his knowledge may be acquired wholly by study of the subject. *Clark v. Bruce*, 12 Hun 274; *Scandell v. Columbia Construction Co.*, 50 App. Div. 512, 64 N. Y. S. 232; *McCormack v. I. R. T. Co.*, 61 Misc. 601, 113 N. Y. S. 1006. But the witness must be shown to be qualified as an expert on the particular subject concerning which he is called to testify. Thus, a lawyer would be competent to express an opinion as to the value of legal services, but not as to the value of the services of a physician, for if the services are professional, the witness should be a member of the profession. A professional nurse is incompetent to testify as an expert on the value of services rendered by one not

a professional nurse. *Scheu v. Blum*, 119 App. Div. 825, 104 N. Y. S. 887. A person who has worked several years in a furniture store, and has also been in the storage, teaming, and auctioneer business, and has conducted art sales is not sufficiently qualified as an expert on the value of paintings. *Ellis v. Thomas*, 84 App. Div. 626, 82 N. Y. S. 1064.

**§ 529. Examination of Experts—Hypothetical Questions.**

The testimony of experts is not confined to facts within their own personal knowledge but may be extended to their opinions upon an assumed state of facts. The Court of Appeals has held that:

“It is a general rule in regard to the opinion evidence of experts that the facts upon which the opinion of the witness is founded must be laid before the trial court, either by assuming them in a hypothetical question or by the testimony of the expert himself if he has observed them.” *Weibert v. Hanan*, 202 N. Y. 328, 95 N. E. 688.

But where the expert testifies that he is familiar with the facts by personal observation, he may express his opinion without first stating the facts upon which it is based, although such facts may always be brought out either on the direct or the cross-examination of the witness. For example, an alienist who has examined a patient with reference to his sanity may state whether, in his opinion, the patient was sane at the time of such examination, without first stating the particular symptoms upon which his opinion is based. *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460, *Richardson's Cases in Evidence*, p. 966; *People v. Faber*, 199 N. Y. 256, 92 N. E. 674. The rule is summarized in *Christastie v. Elmira Water, Light & Railroad Co.*, 202 App. Div. 270, 195 N. Y. S. 156, at p. 272, as follows: “In the examination of an expert there are two proper methods of interrogation: First, where the expert is familiar with the facts by personal observation and so testifies, he may be asked directly for his opinion without stating the facts upon which it is based; second, where the expert is not familiar with the facts upon which his opinion

is based, they must be stated to him hypothetically and upon the assumption of the facts so stated he must base his opinion."

While there is no unyielding rule as to the form which a hypothetical question must take, it is certain that it should be so framed as to clearly present the facts which the counsel claims to be proved, and which the testimony tends to prove, according to his theory of the facts of the case. The counsel may, therefore, assume the existence of any state of facts which the evidence fairly tends to justify. It is not necessary that the facts shall be established beyond all controversy. Each side may shape the questions according to its theory. *Cowley v. People*, 83 N. Y. 464, 470, 38 Am. Rep. 464. A question which assumes any material facts not supported by evidence should be excluded. *People v. Patrick*, 182 N. Y. 131, 172, 74 N. E. 843. None of the material facts in controversy may be taken for granted. *Marx v. Ontario Beach H. & A. Co.*, 211 N. Y. 33, 38, 105 N. E. 97. For example, it was held error to permit an expert to testify to what, in his opinion, caused a certain elevator to fall, whereas he should have been allowed to state only what would cause an elevator to fall under certain conditions set forth in a hypothetical question. *Fearon v. N. Y. Life Ins. Co.*, 162 App. Div. 560, 568, 147 N. Y. S. 644. An expert witness may not express an opinion based on the testimony of other witnesses. Therefore, a hypothetical question based upon facts "as shown by the evidence" or "as based upon all of the evidence in the case" is improper, because it assumes that the witness recollects all of the evidence, when, as a matter of fact, he may not, and because the juror may conclude that certain of the facts in evidence have not been proved. When specific facts are embraced in a hypothetical question the jury can see whether the opinion of the expert is based upon facts which have been proved in the case or not and whether all of the material facts have been taken into consideration. *People v. McElvaine*, 121 N. Y. 250, 24 N. E. 465, *Richardson's Cases in Evidence*, p. 972; *Marx v. On-*

tario Beach H. & A. Co., *supra*; Burns v. Crow, 123 App. Div. 251, 107 N. Y. S. 944; Connor v. O'Donnell, 230 Mass. 39, 119 N. E. 446. But a hypothetical question may assume facts not in dispute. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. S. 922.

An expert opinion based on matters or information not included in the question is incompetent. Cobb v. United Engineering & Contracting Co., 191 N. Y. 475, 84 N. E. 395; Hopper v. Empire City Subway Co., 78 App. Div. 637, 79 N. Y. S. 707, *aff'd* 178 N. Y. 587, 70 N. E. 1100; N. Y. County Nat. Bank v. Herrmann, 173 App. Div. 814, 819, 160 N. Y. S. 422.

### § 530. Medical Experts.

Physicians may give opinions as to matters connected with their profession or with medical science, even though they have not made the matter in question a specialty. Pierson v. Hoag, 47 Barb. (N. Y.) 243. They may not only testify to present conditions of bodily suffering or injuries, but may, also, with some limitations, express opinions as to their cause and permanency.

A physician who has examined a person may describe the condition in which he found him and may then testify that, in his opinion, that condition was the result of a previous condition of the patient observed by him, or that it might be the result of certain facts brought out in the evidence and stated in the form of a hypothetical question. Stouter v. Manhattan Ry. Co., 127 N. Y. 661, 27 N. E. 805; Turner v. City of Newburgh, 109 N. Y. 301, 308, 16 N. E. 344, 4 Am. St. Rep. 453; Kimbrough v. Chicago City Ry. Co., 272 Ill. 71, 111 N. E. 499. A medical witness who has not examined the person whose condition is under consideration may state, in answer to a hypothetical question, whether, in his opinion, a certain physical condition would probably result from a given cause. Young v. Johnson, 123 N. Y. 226, 25 N. E. 363. A medical witness may, also, describe the usual symptoms and characteristics of any disease or



injury or the symptoms produced by a particular drug or poison, for the purpose of aiding the jury in determining the cause of the condition testified to. *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59, 66, 53 N. E. 670.

A medical witness who has knowledge of the case may always express his opinion as to the probability of the patient's recovery or the probable continuance, duration, or permanence of the disease or disability. *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775; *Cross v. City of Syracuse*, 200 N. Y. 393, 94 N. E. 184. But he will not be permitted to express an opinion as to future consequences which are "contingent, speculative or merely possible." *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305; *Kimbrough v. Chicago City Ry. Co.*, *supra*. The rule is that a medical witness may not express an opinion as to the possible or probable outbreak of new diseases or sufferings unless he can first testify that there is such a degree of probability of their occurrence as amounts to a reasonable certainty that they will result from the original injury. *Strohm v. N. Y., L. E. & W. R. R. Co.*, *supra*. The reason for the distinction is clearly stated, in *Griswold v. N. Y. C. & H. R. R. Co.*, *supra*, at p. 64, as follows:

"There is an obvious difference between an opinion as to the permanence of a disease or injury already existing, capable of being examined and studied, and one as to the merely possible outbreak of new diseases or sufferings having their cause in the original injury. In the former case that disease or injury and its symptoms are present and existing, their indications are more or less plain and obvious, and from their severity or slightness a recovery may reasonably be expected or the contrary; while an opinion that some new and different complication will arise is merely a double speculation, one that it may possibly occur, and the other that if it does it will be a product of the original injury instead of some other new and, perhaps, unknown cause." For example, in a negligence action, the plaintiff's physician testified that the plaintiff's present trouble was



spinal irritation caused by the accident, and was also permitted to testify that the injury would prove permanent and would ultimately result in paralysis. *Walden v. City of Jamestown*, 79 App. Div. 433, 80 N. Y. S. 65, *Richardson's Cases in Evidence*, p. 976, approved and affirmed in 178 N. Y. 213, 70 N. E. 466.

A doctor who testified that the plaintiff was suffering from a general mental deterioration and from deafness, and that this condition would be permanent, was also allowed to state that such condition was likely to grow worse as the plaintiff grew older. *Knoll v. Third Avenue R. R. Co.*, 46 App. Div. 527, 62 N. Y. S. 16, *aff'd* 168 N. Y. 592, 60 N. E. 1113.

Doubtful and speculative expressions of opinions by physicians should not be received. *Gleason v. Hudson Valley Ry. Co.*, 143 App. Div. 884, 128 N. Y. S. 759, *Richardson's Cases in Evidence*, p. 980. Thus, when a physician is unable to give an opinion as to which of several possible causes was the reasonably certain cause of a condition, his opinion is incompetent. *Raynor v. Metropolitan Street Ry. Co.*, 106 App. Div. 449, 94 N. Y. S. 632.

The testimony of medical experts is admissible to explain X-ray plates which unexplained are unintelligible to a layman. These plates must, however, have been properly introduced into evidence. *Marion v. B. G. Coon Construction Co.*, 216 N. Y. 178, 110 N. E. 444. It is improper to permit an X-ray specialist to testify from his notes concerning an X-ray picture examined by him where he did not take the picture, had never seen the plaintiff, where the picture was not produced nor its absence accounted for, nor the persons who took the picture called. Merely the testimony of the doctor that the plate he saw bore the name of the plaintiff was clearly insufficient. *Gastiger v. Horowitz*, 220 App. Div. 284, 221 N. Y. S. 481. If the X-ray photographs are produced but used by the physician who has examined the plaintiff merely to refresh his recollection but not as evidence, there is no objection based on the inability of the physician to testify that the X-ray photograph is that of

the plaintiff. *Hinkelman v. Pasteelnick*, 3 N. J. Misc. 1013, 130 Atl. 441.

### § 531. Handwriting Experts.

Expert opinion evidence is admissible to prove handwriting. The expert bases his opinion not on personal knowledge of the writing, but on a comparison of genuine and disputed writings. The standard of comparison must be conceded to be genuine or proved to the satisfaction of the court. The common law rule permitted such a comparison between a disputed writing and any writing which was properly in evidence for other purposes, upon the genuineness of which the jury must pass in any event, but prohibited the introduction of a writing merely as a standard of comparison. *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470, *Richardson's Cases in Evidence*, p. 981. This limitation has been removed by statute in New York. The Civil Practice Act, sec. 332, provides that:

"Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted and submitted to the court and jury in like manner." Under this section, whenever it is sought to establish the identity of the writer of a paper which is in issue or relevant to the issue, any writing may be introduced in evidence as a standard of comparison which is proved to the satisfaction of the court to be the genuine handwriting of the person claimed to have executed the disputed instrument. The writing offered as a standard of comparison must either be conceded to be genuine or proof of its genuineness must be made by common law evidence. *People v. Molineux*, 168 N. Y. 264, 318-330, 61 N. E. 286, 62 L. R. A. 193, *Richardson's Cases in Evidence*, p. 143. Thus, the genuineness of the standard of comparison may be established "(1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses

who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns." *People v. Molineux, supra*, at p. 328. But such proof cannot be made by the testimony of experts after comparison with other admitted or proved writings. *Turnure v. Breitung*, 195 App. Div. 200, 186 N. Y. S. 620, *aff'd* 233 N. Y. 649, 135 N. E. 955. The sufficiency of the proof of genuineness of the standard of comparison must be determined by the court in the first instance. *Farrell v. Manhattan Ry. Co.*, 83 App. Div. 393, 82 N. Y. S. 334, *aff'd* 178 N. Y. 596, 70 N. E. 1098. But this question must ultimately be passed upon by the jury before a conclusion can be reached as to the identity of the writer of the disputed instrument. *People v. Molineux, supra*. A photographic copy of a writing cannot be used as a standard of comparison when the original writing is not in evidence. *Hynes v. McDermott*, 82 N. Y. 41, 50, 37 Am. Rep. 538.

An expert's testimony should be confined to comparing the disputed and conceded writings, and giving an opinion as to whether they were written by the same person. He cannot testify directly as to the genuineness of the signature in question. *People v. Severance*, 67 Hun 182, 22 N. Y. S. 91.

An ordinary witness is incompetent to express an opinion by comparison. His judgment would be no better than that of a juror. The right in such cases is confined strictly to those who are qualified as experts either by scientific study or experience in the examination of handwriting. *Matter of Burbank*, 104 App. Div. 312, 93 N. Y. S. 866, *aff'd* 185 N. Y. 559, 77 N. E. 1183.

There is no distinct rule defining the qualifications of

handwriting experts, but the witness should be specially conversant with handwriting. Teachers of writing, bank clerks, and others engaged in commercial employment whose business compels them to daily scrutinize writings, may testify as experts. *People v. Fletcher*, 44 App. Div. 199, 60 N. Y. S. 777.

The competency of an expert witness who has expressed an opinion based on a comparison of writings may be tested on cross-examination by submitting other specimens of handwriting to the witness and asking him to compare them with specimens in evidence and to state whether they are in the same handwriting. It is also competent to show by other witnesses that the so-called expert is mistaken in his conclusions upon this test. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579.

A handwriting expert may state the reasons for his opinion. *Johnson Service Co. v. MacIernon*, 142 App. Div. 677, 127 N. Y. S. 431.

Straight lines or marks are not "writings" within the rule permitting comparison of handwritings by experts. *Matter of Hopkins*, 172 N. Y. 360, 65 N. E. 173; *Matter of Caffrey*, 174 App. Div. 398, 161 N. Y. S. 277, *aff'd* 221 N. Y. 486, 166 N. E. 1038.

Experts in the mechanism of typewriting machines may be called to testify to an opinion as to whether two typewritten documents were written on the same machine. *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730, 45 L. R. A. (N. S.) 860, *Richardson's Cases in Evidence*, p. 986. See authorities reviewed in *Baird v. Shaffer*, 101 Kan. 585, 168 Pac. 836, annotated L. R. A. 1918D 638.

### **§ 532. Recapitulation of Proof of Handwriting by Opinions of Witnesses.**

I. An ordinary (non-expert) witness may express an opinion as to the genuineness of a disputed writing if it appears that he has become familiar with the handwriting of the party in question

a. By having seen him write at least once;

b. By having seen writings directly or indirectly acknowledged to be his.

II. A witness who is shown to be qualified as a handwriting expert may make a comparison in court between the disputed writing and any writing which is proved to the satisfaction of the court to be the genuine handwriting of the person claimed to have executed the disputed writing and may then state whether, in his opinion, the two were written by the same person.

### **§ 533. Finger Print Experts.**

Qualified finger print experts are competent to express an opinion as to the identity of two sets of finger prints. *People v. Roach*, 215 N. Y. 592, 601, 109 N. E. 618, *Richardson's Cases in Evidence*, p. 994; *Moon v. State*, 22 Ariz. 418, 198 Pac. 288, annotated 16 A. L. R. 362. See, also, *People v. Sallow*, 100 Misc. 447, 165 N. Y. S. 915.

### **§ 534. Systolic Blood Test.**

The systolic blood pressure deception test has not yet gained such a standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. *Frye v. United States*, 293 Fed. 1013.

### **§ 535. Opinions of Counsel.**

Opinions of counsel as to the merits of the case are unimportant, and may not properly be stated to the jury. In the recent case of *People v. O'Regan*, 221 App. Div. 331, 223 N. Y. S. 339, a statement by the District Attorney to the effect that he does not prosecute when he has any doubt as to the accused's innocence was held improper.



## CHAPTER XXV.

### EXAMINATION OF WITNESSES

#### § 537. Order of Proof.

The proper administration of justice requires some regular method of procedure in the trial of an action. Ordinarily, the party holding the affirmative of the issues, be he plaintiff or defendant, should introduce all the evidence on his side before he closes; and this without interruption, except by cross-examination. The party denying the affirmative allegations should then produce his evidence, and finally the evidence in rebuttal is received. *Marshall v. Davies*, 78 N. Y. 414; Code of Crim. Pro., sec. 388. But this order of proof may be and frequently is departed from, in the discretion of the trial judge. In the language of the Court, in *Barson v. Mulligan*, 77 App. Div. 192, 79 N. Y. S. 31, at p. 194: "Upon a trial a party is bound to produce all his evidence before he closes his side of the case, and after he has closed his case and rested it is within the discretion of the court whether or not to allow a reopening of the case to supply omissions or to receive further testimony, but such discretion should be sparingly exercised." See, also, *Blake v. People*, 73 N. Y. 586. The Code of Criminal Procedure, sec. 388, which prescribes the order of a trial in a criminal action, expressly provides that, after each side has put in its affirmative case and rested and the parties are ready to offer rebutting evidence, "the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case." *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730, 12 N. Y. Cr. Rep. 503; *People v. Benham*, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. Rep. 188. It has been held that the court may go so far in the exercise of its discretion as to permit additional evidence to be taken even after the jury has retired. *People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8. The exercise of this discretion by the trial judge in varying the usual mode of procedure by

permitting evidence which has been omitted through inadvertance or other cause, to be introduced at any stage of the trial is not, ordinarily, reviewable on appeal. *Agate v. Morrison*, 84 N. Y. 672; *Leighton v. People*, 88 N. Y. 117. But if there is a flagrant abuse of this discretion the wrong may be redressed upon appeal. *Meyer v. Cullen*, 54 N. Y. 392, 397.

### **§ 538. Separation of Witnesses.**

The purpose of separation is to prevent one witness from being taught by hearing another's testimony. *Chamberlayne's Modern Law of Ev.*, Vol. I., sec. 189. There is much difference of judicial opinion as to whether this may be demanded as matter of right. The weight of authority holds that it is discretionary with the trial court, but if a request to separate the witnesses is made in good faith, it is rarely denied. *People v. Green*, 1 Park. Cr. Rep. (N. Y.) 11.

### **§ 539. Examination Before Committing Magistrate.**

Statutes, in many jurisdictions, now provide for separation on examination of the accused before committing magistrates. The Code of Criminal Procedure, sec. 202, provides:

"The witness produced on the part either of the people or of the defendant cannot be present at the examination of the defendant; and while a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other, until they are all examined."

### **§ 540. Who May Be Excluded.**

All witnesses are subject to be excluded except a witness who is a party to the action. A party to the suit has a right to be present at all times. *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592; Code of Crim. Pro., sec. 203.

**§ 541. Consequences of Disobedience.**

It has been held that a failure to leave the court room in obedience to the court's order disqualifies the witness. This would seem to be a harsh rule, and especially so in the case of an important witness. The party should not be deprived of the testimony of his witness. In New York, the disobedient witness is not disqualified but is in contempt of court, and may be punished accordingly. His testimony should be received with the right of counsel to comment on the fact that he disobeyed the court's order for his exclusion, as affecting his credibility. *Friedman v. Myers*, 14 N. Y. S. 142. The Court of Appeals has said: "It used to be supposed that it was in the discretion of the judge whether the witness should be examined. It is now settled and acted upon by all the judges that the judge has no right to exclude the witness. He may commit him for contempt, but he must be examined, and it is then matter of remark that he has wilfully disobeyed the order." *Chandler v. Horne*, 2 Moody & Rob. (Eng.) 423.

**§ 542. Testimonial Narration.**

The testimony given in court, except testimony by depositions, must be given orally. A witness cannot write out his testimony and then read it to the jury. If this were permitted it would deprive the jury of many of the strongest indications of trustworthiness. The rule compels a witness to state orally the result of his observations and recollections. The prime and essential virtue of a narration consists in accurately expressing actual and sincere recollections. If we may assume that a witness's recollection corresponds to his observation, and his narration corresponds to his recollection, the element of testimonial value is complete. *Wigmore on Ev.*, sec. 766.

**§ 543. Knowledge, Recollection, or Belief.**

In the examination of those who have witnessed a particular act, it often happens that there is a wide difference in the positiveness of their recollections. Thus, one witness

will know a thing positively, another will have a recollection, and still another can express only a belief or an impression as to it. Yet, all are competent to testify as to their recollections or impressions. *Carrington v. Ward*, 71 N. Y. 360, 364; *Blake v. People*, 73 N. Y. 586; *Voisin v. Commercial Mut. Ins. Co.*, 60 App. Div. 139, 70 N. Y. S. 147; *Tichnor Bros., Inc. v. Barley*, 149 App. Div. 871, 134 N. Y. S. 129; *Abbott v. Church*, 288 Ill. 91, 123 N. E. 306, annotated 4 A. L. R. 975; *Lewis v. Freeman*, 17 Me. 260. It has been said that: "Witnesses are not required to speak with such confidence as to exclude all doubt in their minds. If the fact is impressed on the memory, but the recollection does not rise to positive assurance, it is still admissible, to be weighed by the jury." *Hoitt v. Moulton*, 21 N. H. 586. But a belief or impression which is derived from the recollection of the witness as to the facts is to be distinguished from a mere conclusion of the witness. To illustrate: A witness testified that he saw the accused go toward the river with a child in her arms; that he was one hundred yards off and was not sure who the child was; but that it was his best impression that it was the child of the accused. The appellate court held that this testimony was improperly admitted because it appeared that, although the witness knew the child of the accused well, he was too far away to identify the child carried in the arms of the prisoner, and, therefore, it was evident that the witness had merely jumped to the conclusion that the accused must have been carrying her own child. *State v. Thorp*, 72 N. C. 186.

#### **§ 544. Refreshing Memory of Witness by Memoranda.**

It may be that a witness has no recollection of a conversation or other matter, concerning which he is called upon to testify. If so, he may have his memory refreshed by the use of memoranda. In fact, any writing may be used to stimulate and revive a recollection. Even though a memorandum does not refresh the memory of a witness, it may, under certain limitations, be used as evidence. Thus, he may say: "I made a correct memorandum of this con-

versation while my recollection was fresh; I now remember nothing, but can offer my prior recollection as embodied in the memorandum." Wigmore on Ev., sec. 734. The rule, as recognized in New York, is clearly stated by the Court of Appeals in the following language: "1. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, which he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads." *Howard v. McDonough*, 77 N. Y. 592, 593. The above rule was approved and restated in *McCarthy v. Meaney*, 183 N. Y. 190, 76 N. E. 36.

It will thus be observed that a memorandum may be used to revive or refresh a present recollection and also as evidence of a past recollection recorded.

#### § 545. Present Recollection Revived.

The rule which has been adopted by the New York courts is that any paper whatsoever may be used to refresh the recollection of a witness, provided it actually serves that purpose, so that, after inspecting the paper, the witness is able to recall the facts sufficiently to testify to them from memory. *Huff v. Bennett*, 6 N. Y. 337. It is not essential to the use of a memorandum to refresh memory that it should have been made by the witness himself, since it is not the memorandum that is the evidence, but the recollection of the witness. *Huff v. Bennett*, *supra*; *The J. S. Warden*, 219 Fed. 517. In *Huff v. Bennett*, *supra*, a witness was permitted to use a newspaper report to refresh his



memory. To the same effect is *Blanding v. Cohen*, 101 App. Div. 442, 92 N. Y. S. 93, aff'd 184 N. Y. 538, 76 N. E. 1089.

Upon the same principle, it seems that it should not be held essential that the writing be made at the time of the event, since the memorandum itself is not evidence but is merely a means of recalling the facts to the mind of the witness. *Mahoney's Adm'r v. Rutland R. R. Co.*, 81 Vt. 210, 69 Atl. 652. The federal decisions, however, as well as those of several other jurisdictions, hold that a memorandum may be used to refresh the memory of a witness only when it appears that the writing was made contemporaneously with the occurrences, or nearly so. *Putnam v. United States*, 162 U. S. 687, 40 Law. Ed. 1118, 16 Sup. Ct. Rep. 923, and authorities there cited. Many of the authorities are not quite clear on this point, owing to a tendency, when discussing this question to confuse the rule for a memorandum used to refresh a present recollection with the rule for a record of a past recollection. *Wigmore on Ev.*, sec. 761. Thus, in New York, the statement is frequently made that a memorandum made at the time of a transaction may be used to refresh the memory of the witness. *Bigelow v. Hall*, 91 N. Y. 145; *Geer v. N. Y. City Ry. Co.*, 50 Misc. 517, 99 N. Y. S. 483. It has been held, however, that a witness's memory may be refreshed by a record of his testimony given on a former trial. In such a case the writing was not made at or near the time of the events observed. *Hart v. Maloney*, 101 App. Div. 37, 91 N. Y. S. 922. See, also, *Huff v. Bennett*, *supra*.

A copy of the original writing or printed matter may be used. This is not a violation of the best evidence rule, since the writing is not put in evidence. In the language of the Court, in *Huff v. Bennett*, *supra*, at p. 339: "It is well settled that he is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, providing after inspecting it he can speak as to the facts from his own recollection."

Obviously, a witness cannot be allowed to refer to a paper to refresh his recollection as to a fact concerning which he never had any personal knowledge. *Kaplan v. Gross*, 223 Mass. 152, 111 N. E. 853; *Kirschner v. Hirschberg*, 90 N. Y. S. 351. The Court said, in the case last cited, at p. 352: "It was not claimed that this witness ever had personal knowledge of the work done by the plaintiff. Consequently she could not have had any memory on the subject which it was possible to refresh."

Writings cannot be brought to the attention of the jury ostensibly for the purpose of refreshing the memory of a witness when, as matter of fact, there is no necessity for their use for that purpose or when they are incapable of serving such a purpose. Thus, if a witness states, or shows by his testimony, that his recollection is clear, he should not be permitted to use memoranda. *Morris v. N. Y. City Ry. Co.*, 91 N. Y. S. 16; *Berkowsky v. N. Y. City Ry. Co.*, 127 App. Div. 544, 111 N. Y. S. 989. And a witness's memory cannot be refreshed by a paper which does not purport to be a record or note of any fact but is merely an affidavit stating that the disputed fact did or did not exist. *Honstine v. O'Donnell*, 5 Hun 472.

#### § 546. Past Recollection Recorded.

Notwithstanding the fact that a witness's recollection is not refreshed or revived by an inspection of a writing so as to enable him to testify from memory, yet the writing may be used, subject to certain limitations, in connection with and as auxiliary to the testimony of the witness. *Haven v. Wendell*, 11 N. H. 112. This right was at one time denied, and is still questioned in some jurisdictions, but is now firmly established in New York. *Halsey v. Sinsebaugh*, 15 N. Y. 485. In that case, the Court said, at p. 488: "It is well known that the efforts of memory are seldom equal to the task of recalling, after any considerable lapse of time, even the exact substance of words and phrases; while it would be comparatively easy, at the time or immediately afterwards, to make an accurate record of their import. To

exclude such a record, when shown to have been honestly made, would be to reject the best and frequently the only means of arriving at truth." The justification, therefore, for the use of a record of a past recollection is necessity. The limitations under which such a memorandum may be received in evidence are clearly stated, in *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134, at p. 140, as follows:

"It is only as auxiliary to, and not as a substitute for the oral testimony of the witness, that the writing is admissible. It is the duty of the court, in all such cases, to see, before receiving the memorandum in evidence,

1. That it was made at or about the time of the transaction to which it relates,
2. That its accuracy is duly certified by the oath of the witness, and
3. That there is a necessity for its introduction on account of the inability of the witness to recollect the facts."

**§ 547. Memorandum Made at or near the Time of the Events.**

The time when the record should be made has been variously phrased. To illustrate: "At or about the time of the transactions to which it relates," *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; "at the time or almost immediately afterwards," *Halsey v. Sinsebaugh*, 15 N. Y. 485; "at or about the time or soon after," *Howard v. McDonough*, 77 N. Y. 592. While the memorandum need not be made contemporaneously with the event, yet, to insure accuracy, it should be made while the facts are fairly fresh in the memory of the witness. A statement prepared long after the event cannot be used. *Maxwell v. Wilkinson*, 113 U. S. 656, 28 Law. Ed. 1037, 5 Sup. Ct. Rep. 691. The time allowed for making the memorandum must turn upon the circumstances of each particular case, for the phrases used furnish no accurate test.

**§ 548. Accuracy Guaranteed by Witness.**

The correctness of the statements contained in the memorandum must be verified by the witness before the memorandum can be received. *McCarty v. Meaney*, 183 N. Y. 190, 76 N. E. 36. This is ordinarily done by the testimony of the witness that, although he has no present recollection of the facts, he remembers that he made or saw the memorandum about the time of the events and that he knew it to be correct at that time. But if the witness does not remember having seen the memorandum before, he may testify that, from his handwriting, habits, or usual course of business in reference to matters of that nature, he is convinced that the statements are correct. It is not sufficient for a witness to state merely that he recognizes the signature as his own and that he never affixed his signature to a paper which did not contain a correct statement of facts within his own knowledge. *Hodas v. Davis*, 203 App. Div. 297, 196 N. Y. S. 801. He must assert a present conviction of the correctness of the statements, although he need not, in every case, state the ground of his belief. See authorities reviewed in *Hodas v. Davis*, *supra*.

It must appear, also, that at the time when the witness made or saw the memorandum he had personal knowledge of the facts stated therein. A memorandum cannot be received as a record of the witness's past recollection where it appears that the memorandum was made by the witness from facts reported to him by another, as such evidence would be pure hearsay. *Peck v. Valentine*, 94 N. Y. 569, *Richardson's Cases in Evidence*, p. 1003. But this use of memoranda as auxiliary evidence must be distinguished from the admissibility as primary evidence of book entries made in the regular course of business, under the rule laid down in *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839, *Richardson's Cases in Evidence*, p. 412.

Some of the earlier decisions assumed that the memorandum must be in the witness's own handwriting, *Howard v. McDonough*, 77 N. Y. 592, but the weight of authority

supports the rule that it is sufficient if the witness saw the memorandum soon after it was made and recognized it at that time as containing a true statement of facts within his own knowledge. Entries made by a bookkeeper of items furnished by the witness and seen two days later by him and recognized at that time to be correct were held admissible in *Clark v. Nat. Shoe and Leather Bank*, 164 N. Y. 498, 502, 58 N. E. 659. But it would be error to allow a witness to use an itemized statement of account which he had neither made nor seen before. *Callman v. Bruckenfelf*, 108 N. Y. S. 1070.

The New York cases hold strictly to the requirement that the original memorandum must be produced. *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Marcy v. Shults*, 29 N. Y. 346; *Peck v. Valentine*, *supra*. The rule is stated, in *Mankoff, Inc. v. Erie R. R. Co.*, 97 Misc. 415, 161 N. Y. S. 345, at p. 417, as follows: "If a witness at the time of testifying has a present recollection of the facts contained in a paper, he may use a copy to refresh his memory as to its contents; but if he has no present recollection of the facts contained in the paper, but merely has a present confidence that the paper contains facts which he once knew, the original paper must be produced in order to be used to assist the witness in testifying, or its absence must be accounted for; and this is true whether it is desired to introduce the paper in evidence as an exhibit, or have the witness read its contents into the record." In most jurisdictions, copies are received when the original manuscript is not available. *Wigmore on Ev.*, sec. 749. Although this practice would seem to be sanctioned by the rule as stated in *Mankoff, Inc. v. Erie R. R. Co.*, *supra*, the Court of Appeals, in *Peck v. Valentine*, *supra*, held definitely that even in a case where the original memorandum is shown to be lost, its contents may not be proved by secondary evidence.

#### § 549. Witness Unable to Speak from Memory.

Before a memorandum can be received as a record of a witness's past recollection, it must appear that the witness



is unable, even after looking at the memorandum, to testify to the facts from memory. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Nat. Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; *People v. McLaughlin*, 150 N. Y. 365, 392, 44 N. E. 1017; *Mattison v. Mattison*, 203 N. Y. 79, 96 N. E. 359. It thus appears that the New York courts prefer a revived present recollection to a recorded past recollection, for a memorandum of past recollection is permitted only "When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them." *Howard v. McDonough*, 77 N. Y. 592, 593.

The Court of Appeals in the recent case of *People v. Weinberger*, 239 N. Y. 307, 146 N. E. 434, took a somewhat different position when it said: "The rule that the present recollection of a witness must be exhausted before a record of his past recollection may be admitted in evidence, though applied in New York and the Federal Courts has not been universally accepted or approved. There are times when the record of a past recollection, if it exists, is more trustworthy and desirable than a present recollection of greater or less vividness. \* \* \* The transcript represents a record of the witness's past memory of the play more reliable as evidence than testimony based upon his present memory could possibly be, and it should, therefore, have been received, especially, since no suggestion was made that the usual formal questions should first be asked."

From the above it is difficult to determine whether the court was creating a new situation not contemplated by the present rules or was actually predicting a limitation of the use of our present classification.

#### **§ 550. Memorandum Adopted by Witness as His Testimony.**

A memorandum of a past recollection is not, of itself, independent evidence of the facts contained therein. Although it may be received in evidence in connection with and

as auxiliary to the testimony of the witness, its use is not regulated by the rules governing documentary evidence. The witness himself swears to the facts contained in the memorandum, not from memory, but because of his confidence in the correctness of the writing. The writing thus becomes a present evidentiary statement of the witness, verified by his oath. As such, the contents of the paper may be read to the jury by the witness or the paper itself may be put in evidence, and the testimony of the witness and the contents of the paper are to be taken together as equivalent to a present positive statement of the witness affirming the truth of the facts stated in the memorandum. *Manning v. School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356, 360; *Cottentin v. Meyer*, 80 N. J. L. 52, 76 Atl. 341.

#### § 551. Memorandum of Long Schedules.

It frequently happens, in actions for the conversion of a store of goods, actions upon fire insurance policies, actions on long accounts, etc., that a witness is called upon to testify to hundreds or thousands of items, which no witness could carry in his mind. In such a case a witness may make a list of all the items or he may use a list which has been prepared previously for some other purpose, and in either case, he may aid his memory by the use of such list while testifying. "After the witness has testified, the memorandum may be put in evidence, not as proving anything by itself, but as a detailed statement of the items testified to by the witness." *Howard v. McDonough*, 77 N. Y. 592, 594. See, also, *McCormick v. Penn. Cent. R. R. Co.*, 49 N. Y. 303, 315; *Wise v. Phoenix Fire Ins. Co.*, 101 N. Y. 637, 4 N. E. 634; *Ellsworth v. Aetna Ins. Co.*, 105 N. Y. 624, 11 N. E. 355; *Cohen v. Sun Ins. Office*, 198 N. Y. 140, 91 N. E. 265. This use of memoranda belongs in the third group of the classification adopted by the Court of Appeals, in *Howard v. McDonough*, *supra*, viz., "cases which do not come under either of the foregoing heads."

**§ 552. Use of Memoranda on Cross-Examination.**

Although a writing which revives a present recollection is in no way used evidentially, yet the opposing counsel has the right to inspect it and use it to test the credibility of the witness and to show that it could not properly refresh his memory. *Peck v. Lake*, 3 Lans. (N. Y.) 136; *Tibbets v. Sternberg*, 66 Barb. (N. Y.) 201; *Schwickert v. Levin*, 76 App. Div., 373, 78 N. Y. S. 394; *Richardson v. Nassau Elec. R. R. Co.*, 190 App. Div. 529, 532, 180 N. Y. S. 109; *Miller v. Greenwald Petticoat Co.*, 192 App. Div. 559, 562, 183 N. Y. S. 97; *People v. Schepps*, 217 Mich. 406, 186 N. W. 508; *Green v. State*, 53 Tex. Crim. Rep. 490, 110 S. W. 920, annotated 22 L. R. A. (N. S.) 706. There is no question as to the right of inspection and cross-examination where the memorandum fails to revive a present recollection, for in such cases the writing, as well as the testimony, is admissible. The reason for the rule is clearly stated by the Court, in *Tibbets v. Sternberg*, *supra*, as follows: "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, of the accuracy of which he knows nothing. The right of a party to protection against the introduction against him of false, forged, or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth."

**§ 553. Other Modes of Refreshing Memory.**

Although a party may not impeach the credibility of his own witness, nevertheless, when surprised or disappointed by unexpected testimony or by a failure to testify to certain material facts, the attorney for the party may interrogate the witness in respect to previous testimony or declarations of the witness for the purpose of refreshing his recollection. *Bullard v. Pearsall*, 53 N. Y. 230, *Richardson's Cases in Evidence*, p. 1017; *O'Hagan v. Dillon*, 76 N. Y. 170, 173; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122. In the language of the Court, in *Bullard v. Pearsall*, *supra*, at p. 231: "We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to

his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth." But this practice is allowed only in cases where the party or his counsel is honestly surprised by the testimony of his witness. *People v. Cascia*, 191 App. Div. 376, 381, 181 N. Y. S. 855, 38 N. Y. Crim. Rep. 300.

#### § 554. Interpreters.

Foreigners, deaf and dumb persons and others unable to speak the English language may testify through interpreters. If there is no official interpreter attached to the court, it is the duty of the trial judge to appoint a suitable interpreter whenever the necessity is shown to exist. *Mendela v. Metropolitan Street Ry. Co.*, 43 Misc. 5, 86 N. Y. S. 930. The office of interpreter may be discharged by anyone who has a fair knowledge of English and of the language to be interpreted. *People v. Constantino*, 153 N. Y. 24, 33, 47 N. E. 37. If the witness is a deaf mute, the interpreter must be familiar with the code of signs employed by the witness. *People v. McGee*, 1 Denio (N. Y.) 21; *Chamberlayne's Modern Law of Ev.*, Vol. I., sec. 355. An interpreter must be sworn to interpret well and truly, and a failure to administer such an oath to an interpreter is ground for reversal. *People v. Fisher*, 182 App. Div. 301, 169 N. Y. S. 729. Testimony repeated on the witness stand of what an interpreter not on the witness stand said when the police examined the accused is hearsay, and hence inadmissible. *People v. Sing*, 242 N. Y. 419, 152 N. E. 248.

#### § 555. Maps, Diagrams, Models, etc.

The right to use and introduce maps, diagrams and models to illustrate the testimony of witnesses is unquestioned. *Western Gas Const. Co. v. Danner*, 97 Fed. 882; *Clegg v. Metropolitan Street Ry. Co.*, 1 App. Div. 207, 37 N. Y. S. 130, *aff'd* 159 N. Y. 550, 54 N. E. 1089.

### § 556. Leading Questions.

The simplest form of testimonial statement is an uninterrupted narrative. But testimony may be furnished in response to interrogations and not as a spontaneous utterance. When testimony is obtained by answers to questions, certain opportunities for abuse may arise, and it is this danger of error that prohibits the use of a leading question. "A question is leading which puts into a witness's mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him." *People v. Mather*, 4 Wend. (N. Y.) 229, 247, 21 Am. Dec. 122. A witness may unconsciously accept the suggestion of a question, and counsel may, therefore, by the use of interrogations, supply a false memory for the witness; *i. e.*, suggest desired answers not based upon real recollection. Wigmore on Ev., sec. 769. Mr. Bentham says: "A question is a leading one when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information, is in reality giving instead of receiving it." Bentham, *Rationale Judicial Evidence*, Browning's Edition, Vol. VI., p. 338.

It is not always an easy matter to determine whether or not a question is leading. A suggestion may be hidden in the tone of the voice, rather than in the words. Therefore, any question may, under certain circumstances, be suggestive or leading. In *Steer v. Little*, 44 N. H. 613, Richardson's Cases in Evidence, p. 1005, the Court divided leading questions into three classes:

1. Questions calling for no other answer than yes or no.



2. Questions so framed as to suggest to the witness the answer desired.

3. Questions which assume facts in controversy.

### § 557. Questions Answered by Yes or No.

Questions which call for no answer other than a simple affirmative or negative are often objectionable because it is desirable that the witness should narrate his observations in his own words. In the language of the Court, in *Steer v. Little*, 44 N. H. 613: "The witness is to answer in his own language; the counsel is not allowed to substitute his own artful statement for that of the witness."

### § 558. Questions Framed to Suggest Answer.

A question may be so framed as to suggest to the witness the answer which is desired. The negative "not" is often relied upon as indicating a leading question. Thus, "Did you not hear the sound of a horn?" conveys the idea that an affirmative answer is desired; but the question without "not" does not betray the desired answer. The alternative form, "Did you or did you not hear the sound of a horn?" is, ordinarily, proper, because both affirmative and negative answers are presented to the witness. But under certain conditions an alternative question, "whether or not," may be leading and, therefore, improper; *e. g.*, where the question contains striking or peculiar facts or lengthy details which might not otherwise have suggested themselves to the mind of the witness. *People v. Mather*, 4 Wend. (N. Y.) 229, 248, 21 Am. Dec. 122. For illustrations, see *Jones on Ev.*, sec. 816, notes 17 and 18.

### § 559. Questions Assuming Controverted Facts.

A question which assumes a controverted fact is also objectionable as leading. *People v. Mather*, 4 Wend. (N. Y.) 229, 249, 21 Am. Dec. 122. To illustrate: What was the plaintiff doing when the defendant struck him? the controversy being whether the defendant did strike. A dull or forward witness may answer the first part of the question

and omit the last." *Steer v. Little*, 44 N. H. 613, Richardson's Cases in Evidence, p. 1005. Again, the issue being whether the insured was really deceased or had fraudulently pretended to be drowned, a question, "State what was the nature of the current at the point where Sheppard fell in" was held leading and improper. The Court said, "This sort of assumption is one of the most pernicious forms in which the vice of leading questions can make its appearance, its tendency being to induce the witness to adopt the theory of the facts propounded by the examiner, and shape his testimony in a way to lend support to that theory." *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

#### EXCEPTIONS: LEADING QUESTIONS PERMITTED

##### § 560. Introductory Matter.

Leading questions are proper which relate to introductory matter and which tend to carry the witness quickly to matters material to the issue. Thus, where a witness is called to testify to a conversation, admission, agreement, or other fact in issue, his attention may be drawn to the subject, occasion, time, place, or person, by leading questions. See *Cope v. Sibley*, 12 Barb. (N. Y.) 521, 523.

##### § 561. Hostile, Biased, or Unwilling Witnesses.

A leading question is permitted, even in a direct examination, where the witness appears to be hostile or unwilling. In such cases the direct examination may, in the discretion of the court, assume the character of a cross-examination. *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, Richardson's Cases in Evidence, p. 1009; *People v. Sexton*, 187 N. Y. 495, 509, 80 N. E. 396, 116 Am. St. Rep. 621; *State v. Benner*, 64 Me. 267. As a hostile witness conceals as much and reveals as little of the truth as his conscience and skill will permit, there is little danger of coloring the witness's testimony by suggesting the desired answers in a question.

In *Becker v. Koch*, *supra*, the Court says: "An adverse witness may be cross-examined, and leading questions may

be put to him by the party calling him for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist."

The hostility, bias, or unwillingness of a witness is to be decided by the judge, according to his impressions of the demeanor of the witness upon the trial, taking into consideration the relation of the witness to the party calling him and any other circumstances which might induce him to withhold testimony. *Wigmore on Ev.*, sec. 774.

### **§ 562. Facts Not Remembered.**

Where the witness's recollection is exhausted, suggestions by interrogation are allowed to assist his memory. Therefore, a question which supplies a name, date, or items of goods lost, destroyed, or sold is permissible. *Greenleaf on Ev.*, 16th Ed. sec. 435; *Cheaney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609.

Leading questions are permitted, also, where the witness is illiterate. *Nicoletti v. Dieckmann*, 89 Misc. 131, 151 N. Y. S. 520; *Strnad v. William Messer Co.*, 142 N. Y. S. 314.

### **§ 563. Leading Questions on Cross-Examination by Opponent.**

On cross-examination, since the witness may be presumed not to favor the cross-examiner, leading questions are allowed. *Greenleaf on Ev.*, 16th Ed., sec. 435; *Livingston v. Keech*, 34 Super. Ct. (N. Y.) 547. But there is no right to put leading questions on cross-examination while seeking to elicit new matter. *People v. Genet*, 19 Hun 91; *People v. Court of Oyer and Terminer*, 83 N. Y. 436.

### **§ 564. Leading Questions by the Court.**

The court, in its discretion, may ask leading questions of a witness for the purpose of bringing out the true facts, provided the trial judge does not in this manner impress the

jury with his opinion as to which of the parties is entitled to judgment. See note to *Parker v. State*, 132 Tenn. 327, 178 S. W. 438, in L. R. A. 1916A 1196.

**§ 565. Leading Questions in Discretion of Trial Court.**

In all common law jurisdictions the admission of a question which is objected to as leading is a matter resting largely in the discretion of the trial judge, and appellate courts are reluctant to reverse a judgment for error in that respect. *Steer v. Little*, 44 N. H. 613. The New York Court of Appeals has gone so far as to hold that the discretion of the trial court to determine whether a question is leading, and also whether it should be permitted even though leading, is not subject to review on appeal. *Walker v. Dunsbaugh*, 20 N. Y. 170; *Downs v. N. Y. C. R. R. Co.*, 47 N. Y. 83, 88. Other cases state the rule to be that the discretion of the court in this matter is subject to be reviewed, but that the determination of the trial court will not be regarded as error unless the discretion has been abused. *Budlong v. Van Nostrand*, 24 Barb. (N. Y.) 25. A more practical statement of the rule is found in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122: "Considerable discretion is left to a judge who presides at a trial to regulate and control the examination of witnesses, and this court are cautious to avoid encroaching upon the proper exercise of this discretion. If, however, an established rule of law has been violated, the party injured has an undoubted right to relief, and the court feel no reluctance in such a case to grant it."

**§ 566. Cross-Examination.**

After a witness has testified, on direct examination, for the party who called him, he is turned over to counsel for the adverse party to be cross-examined. Every witness is subject to the right of cross-examination by the opponent, for it is by this method that a witness may be discredited. The right of cross-examination is universally recognized as the principal and most efficacious test for the discovery of

truth. Greenleaf on Ev., 16th Ed., sec. 446. One of the reasons for excluding hearsay evidence is that the declarant, whose statements are offered, cannot be subjected to the test of cross-examination. For illustrations of the theory and art of cross-examination, see Wigmore on Ev., sec. 1368.

### § 567. Cross-Examination Prevented.

If cross-examination is prevented by accident or design, the direct examination is rendered incompetent. *People v. Cole*, 43 N. Y. 508; *Gallagher v. Gallagher*, 92 App. Div. 138, 87 N. Y. S. 343; *Wray v. State*, 154 Ala. 36, 45 So. 697, 129 Am. St. Rep. 18, annotated 15 L. R. A. (N. S.) 493. In *People v. Cole*, *supra*, a material witness for the People went into convulsions after her direct examination and became so ill as to render her cross-examination impossible. Counsel for the defendant moved that the testimony of this witness be stricken out or that the trial be adjourned until the recovery of the witness. Both requests were denied by the trial judge. The Court of Appeals granted a new trial on the ground that the defendant's request to strike out the testimony should have been complied with, as the defendant, without any fault on his part, had lost his right of cross-examination. The better practice would seem to be to declare a mistrial if the injured party desires it. If, however, the injured party elects to proceed with the trial, he must be held to have waived his right of cross-examination and cannot insist that the testimony be withdrawn from the jury. *Gale v. State*, 135 Ga. 351, 69 S. E. 537.

The opportunity to cross-examine is all that is required. The exercise of the right may not always be judicious, and is, therefore, frequently waived. *Bradley v. Mirick*, 91 N. Y. 293.

A deposition may be suppressed because of a refusal of the witness examined on commission to answer material questions on cross-examination, but a motion to suppress on that ground must be made before trial. Otherwise, the party will be deemed to have waived his right. *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, 87.



**§ 568. Scope of the Cross-Examination.**

The cross-examination should be limited to such matters as have been gone into on the examination in chief, with the necessary exception that the cross-examining counsel may ask proper questions for the purpose of impeaching the credibility of the witness. *Houghton v. Jones*, 1 Wall. (U. S.) 702, 17 Law. Ed. 503; *Hall v. Allemannia Fire Ins. Co.*, 175 App. Div. 289, 292, 161 N. Y. S. 1091. In the language of the Court, in *Houghton v. Jones*, *supra*: "The rule has been long settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause." But the order of proof is always a matter which rests largely in the discretion of the trial court. Therefore, the trial court, in its discretion, may and frequently does relax the rule and allow the cross-examination to extend to other matters pertinent to the issue. *Wills v. Russell*, 100 U. S. 621, 25 Law. Ed. 607.

**§ 569. Cross-Examination—Error on Collateral Matters Cannot Be Shown.**

The cross-examiner, as a rule, is bound by the answers given to his questions on collateral matters. Without this rule collateral issues might be multiplied *ad infinitum*. An inquiry as to immoral or criminal acts or conduct of the witness for the purpose of impeaching his credibility is purely collateral. Therefore, the cross-examiner is bound by the answers of the witness upon such matters, and may not afterwards call other witnesses, or introduce any other evidence, to contradict him in reference to such answers. Editorial, *New York Law Journal*, February 4, 1927; *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415; *People v. DeGarmo*, 179 N. Y. 130, 71 N. E. 736; *Potter v. Browne*, 197 N. Y. 288, 293, 90 N. E. 812, *Richardson's Cases in Evidence*, p. 1014. But where the credibility of a witness is attacked by proof of his conviction of a crime,

the cross-examiner is not concluded by his answer. This is an exception to the above rule. Civil Practice Act, sec. 350; Penal Law, sec. 2444.

Again, when justice requires it, a collateral matter may be gone into and its truth established or disproved. Thus, "the relations which a witness has to the case, or to a party, threats made by him, the fact that a party tried to bribe him, the fabrication, destruction or concealment of evidence and the like, may be shown." *Hoag v. Wright*, 174 N. Y. 36, 45, 66 N. E. 579, 63 L. R. A. 163. This case, *Hoag v. Wright*, overrules *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, *Richardson's Cases in Evidence*, p. 1056, where it was held that, if an expert, after testifying to the handwriting of a paper, is shown, upon cross-examination, other writings, and asked if they are by the same writer, his answer that they are concludes the cross-examiner, and evidence that they were written by a third party is not competent, since it would draw a collateral matter in issue.

### § 570. Examination of Witnesses for the Defense.

After the witnesses for the party holding the affirmative of the issues have been examined and cross-examined, the adverse party is ready to put in his evidence. The direct examination of the witnesses for the defense is governed by the same principles as that of the opponent's. The opponent's case is met

1. By impeaching his witnesses, or
2. By proving that the facts are not as testified to by them.

### § 571. Impeachment of Witnesses.

A party may impeach the credibility of his opponent's witness.

1. By showing his general bad reputation with respect to truth and veracity.
2. By interrogating him on cross-examination concerning any immoral, vicious, or criminal act of his life which

may affect his character and tend to show that he is not worthy of belief.

3. By showing that he has made statements on other occasions which are inconsistent with his present testimony.

4. By showing his bias in favor of the party calling him, his hostility towards the party against whom he is testifying or his interest in the case.

5. By showing that he has been convicted of a crime.

6. By showing that, either at the time of the occurrences to which he has testified or at the time of giving the testimony, he was under the influence of drugs or liquor or was ill or mentally deranged.

#### **§ 572. Impeachment by Showing Bad Reputation for Truth and Veracity.**

A witness may be impeached by showing his general bad reputation for truth and veracity. The impeaching witness must first be asked if he knows the general reputation of the witness with respect to truth and veracity, in the community where the witness resides, and if he does not know it he is incompetent. *Sturmwald v. Schreiber*, 69 App. Div. 476, 479, 74 N. Y. S. 995. The fact that he does not reside in the same town with the person whose credibility is in question is immaterial, provided it appears that he "resides, moves, circulates, or does business" within "the natural radius of repute." The court will not permit a stranger sent out by the adverse party to testify to the result of his inquiry, but otherwise, if the witness states that he knows the general reputation for veracity of the person in question, in the community in which he lives, the court will not look into his qualifications, but will allow his testimony, leaving its value to be determined by the jury. *People v. Loris*, 131 App. Div. 127, 115 N. Y. S. 236. If he knows the witness's reputation he may state what that reputation is. *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *Wetherbee v. Norris*, 103 Mass. 565.

Under the English rule, it is proper to ask the impeaching witness, who has testified that he knows the reputation for veracity of the person in question and that it is bad, whether he would believe him upon his oath, and this practice has been referred to with approval by the Court of Appeals. *Carlson v. Winterson*, *supra*. The rule has been severely criticised, however, and has been discarded in several jurisdictions, on the ground that it calls for a mere opinion of the witness and permits him to usurp the function of the jury. *Hooper v. Moore*, 48 N. C. 428; *Eastman v. Boston El. Ry. Co.*, 200 Mass. 412, 86 N. E. 793. A witness who is called to sustain the character of an impeached witness may state that he would believe him under oath, but this rests upon a different principle.

#### § 573. Only Reputation Evidence Admissible.

Such testimony must be confined strictly to the general reputation of the witness for veracity. The impeaching witness may not testify to specific instances of want of veracity on the part of the witness whose credibility is in question; nor may he express an opinion as to his veracity based on his own observation. *Kimmel v. Kimmel*, 3 Serg. & R. (Pa.) 336, 8 Am. Dec. 655. Specific instances of vicious, immoral, or criminal conduct which might tend to render one unworthy of belief may not be testified to by an impeaching witness. *Conley v. Meeker*, 85 N. Y. 618; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504. Such specific instances may, however, be inquired about of the witness sought to be impeached, upon his cross-examination.

#### § 574. Must Be Confined to Reputation for Veracity.

Dicta may be found in numerous opinions to the effect that testimony which is offered to impeach a witness need not be confined strictly to reputation for truth and veracity but may be extended to his reputation with respect to general moral character, upon the theory that a man of general bad moral character is unworthy of belief, and, in fact, this view seems to have been acquiesced in quite gen-

erally in the earlier decisions in this State. *Bakeman v. Rose*, 18 Wend. (N. Y.) 146; *Kenyon v. People*, 26 N. Y. 203; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347. See Wigmore on Ev., sec. 922. But the Court of Appeals has held, in a more recent decision, that such testimony must be confined strictly to the general reputation of the witness for veracity. *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676, *Richardson's Cases in Evidence*, p. 117. In that case, the trial judge permitted the prosecution to introduce evidence as to the defendant's general bad reputation, on the theory that the defendant, by becoming a witness in his own behalf, had opened the door to such an attack. In holding such testimony inadmissible, the Court of Appeals said, at p. 432: "But when he (the defendant) assumes the character of a witness he exposes himself to the legitimate attacks which may be made upon any witness. Other witnesses may be called to impeach his credibility by showing that his general reputation for veracity is bad, or he may upon cross-examination be interrogated as to any specific act or thing which may affect his character and tend to show that he is not worthy of belief. . . . We think that evidence of general bad character, which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief, any more than evidence of a reputation for untruthfulness should be directly decisive of his guilt or innocence. A man may have the reputation of being a liar, and yet scorn to steal sheep; and by the same rule one who cannot resist the temptation to commit larceny may never lie about it."

All authorities agree that testimony as to the reputation of a witness with respect to any specific trait of character other than veracity is inadmissible for the purpose of impeaching the credibility of a witness. To illustrate: A witness may not be impeached by evidence of her general bad reputation for chastity. *Bakeman v. Rose*, *supra*; *Kenyon v. People*, *supra*.



**§ 575. Time of Reputation.**

The reputation proved need not be recent, but should not be too remote. It would seem that reputation at any time should be received. In *People v. Abbot*, 19 Wend. (N. Y.) 192, the Court says, at p. 200: "The character of the prosecutrix for truth and veracity had already been slightly impeached, when it was proposed to follow that out by showing that it was also bad several years before. The inquiry is not in its nature limited as to time. The character of the habitual liar or perjurer seven years since, would go at least to fortify the testimony which should now fix the same character from the same person. Witnesses must speak on this subject in the past tense. Character cannot be brought into court and shown to them at the moment of trial. A long established character for good or evil is always more striking and more to be relied on than that of a day, a month or a year." See, also, *Dollner v. Lintz*, 84 N. Y. 669; *Sturmwald v. Schreiber*, 69 App. Div. 476, 74 N. Y. S. 995.

**§ 576. Impeachment by Cross-Examination: Specific Instances of Misconduct.**

A witness may be cross-examined concerning any immoral, vicious, or criminal act of his life which may affect his character and tend to show him to be unworthy of belief. Some confusion results from a failure to distinguish between questions directed to an impeaching witness and those directed to the witness assailed. The examination of an impeaching witness must be confined to general reputation for veracity. But it is otherwise of inquiries addressed to the witness assailed. Specific offenses may be inquired about for the purpose of impairing the witness's credibility. *Shepard v. Parker*, 36 N. Y. 517. That a witness is engaged in a disreputable business, or is addicted to vicious practices, or follows a nefarious, though perhaps not criminal, occupation, may be shown by questions put to him on cross-examination. *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757.

A female witness may be interrogated as to her chastity, or a male witness may be questioned concerning his illicit relations with women, his habit of frequenting houses of ill repute, etc., for the purpose of impeaching his or her credibility. *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *People v. Fiori*, 123 App. Div. 174, 108 N. Y. S. 416; *Osborne v. Seligman*, 39 Misc. 811, 81 N. Y. S. 346. As stated by the Court, in the case last cited, at p. 812: "It has been repeatedly held that men and women whose lives indicate an abandonment or lack of moral principles, and show them to be lewd and debased characters void of shame or decency, have not usually a great respect for the truth or the sanctity of an oath." This line of interrogation is permitted only of the witness whose testimony is sought to be impeached. It is not permitted to thus question a witness who is called to impeach another witness. *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812, *Richardson's Cases in Evidence*, p. 1014.

**§ 577. Scope of Cross-Examination Bearing on Credibility.**

While the scope of the cross-examination for the purpose of impeaching the credibility of a witness is almost unlimited, yet it should be confined to matters which have some fair tendency to show moral turpitude and should not be extended to matters which can have no bearing on the question of the witness's veracity. A witness should not be asked, for example, whether he moved out of certain premises without paying the rent, since the mere fact that one has not paid a certain debt cannot be said to impugn his veracity. *People v. Montlake*, 184 App. Div. 578, 583, 172 N. Y. S. 102. And it is held error to permit a witness to be questioned as to his belief in a Supreme Being who would punish false swearing. *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182.

**§ 578. Extent of Cross-Examination Bearing on Credibility Discretionary with Trial Court.**

The extent to which disparaging questions, not relevant to the issue, but bearing on the credibility of a witness, may be put upon cross-examination is discretionary with the trial court, and its rulings are not subject to review unless it clearly appears that the discretion has been abused. *Third Gt. W. Turnpike Road Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311; *People v. Webster*, 139 N. Y. 73, 84, 34 N. E. 730; *People v. Slover*, 232 N. Y. 264, 133 N. E. 633; *Dungan v. State*, 135 Wis. 151, 115 N. W. 350. To illustrate: On the trial of an indictment for administering poison with intent to kill, the wife of the victim of the crime, who was the principal witness for the prosecution, was asked on cross-examination whether she was in the habit of having illicit intercourse with men other than her husband. On objection of the district attorney, the trial court excluded the questions. In sustaining the ruling, the Court of Appeals said: "It is claimed that collateral evidence is allowable from the witness himself, tending to discredit and disgrace him; and that the asking of questions disparaging to the character of a witness, is a matter of right to a party on cross-examination. This is not so. The extent of the cross-examination of a witness upon matters immaterial to the issue is in the discretion of the judge before whom the trial is conducted. Inquiries on irrelevant topics to discredit the witness, and to what extent a course of irrelevant inquiry may be pursued, are matters, in this State and in England, committed to the sound discretion of the trial court." *La Beau v. People*, 34 N. Y. 223, 230.

**§ 579. Impeachment by Showing Self-Contradictory Statements.**

A party may always show that one of his adversary's witnesses has, on another occasion, made statements which are inconsistent with some material part of his present testimony, for the purpose of impeaching his credibility

and thereby discrediting his testimony. *Larkin v. Nassau Elec. R. R. Co.*, 205 N. Y. 267, 98 N. E. 465; *Burke v. Borden's Condensed Milk Co.*, 98 App. Div. 219, 90 N. Y. S. 527. Such statements may be either oral or written. *Gaffney v. People*, 50 N. Y. 416, 423; *Lederer v. Lederer*, 108 App. Div. 228, 231, 95 N. Y. S. 623. Testimony given at a former trial or statements made in pleadings or affidavits in judicial proceedings are competent as impeaching evidence. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. S. 832, *aff'd* 184 N. Y. 542, 76 N. E. 1095; *Heggos v. Streeter*, 182 App. Div. 525, 169 N. Y. S. 818. But prior declarations of the witness are inadmissible as impeaching evidence unless it is clear that such declarations are inconsistent with a material part of his testimony. *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *People v. Ryan*, 55 Hun 214, 218, 8 N. Y. S. 241; *Matter of Eno*, 196 App. Div. 131, 158, 187 N. Y. S. 756.

A witness who has properly testified to his opinion may be discredited by evidence that he has expressed a contrary opinion on some other occasion. Illustrations: The chief engineer of a steamer who testified that he regarded the boat as entirely safe and seaworthy was properly impeached by showing that, immediately after the vessel burned, he exclaimed: "My God! is it possible that so many lives should be lost, when \$500 expended on those water jackets would have saved the whole." A subscribing witness to a will who has testified to his opinion that the testator was of sound mind may be discredited by evidence that he has formerly expressed a contrary opinion. *Matter of Oates*, 171 App. Div. 679, 157 N. Y. S. 646; *Beaubien v. Cicotte*, 12 Mich. 459. But a witness cannot be impeached by showing former declarations of opinion on the merits of the matter in controversy which are inconsistent with the conclusion which the facts testified to by him may tend to establish. *Schell v. Plumb*, 55 N. Y. 592, 599; *Holmes v. Anderson*, 18 Barb. (N. Y.) 420; *Matter of Eno*, *supra*.

**§ 580. Foundation for Self-Contradictory Statements as Impeaching Evidence.**

A foundation must be laid for the introduction of inconsistent oral declarations as impeaching evidence by asking the witness sought to be impeached whether he made such statements, specifying the time and place, the person to whom made, and the language used. The purpose of the rule is to give the witness timely warning that certain statements claimed to have been made by him will be used to impeach his testimony, so that he may be prepared to correct his testimony or to explain the apparent inconsistency between his testimony and his former statements. *Gaffney v. People*, 50 N. Y. 416, 423; *People v. Weldon*, 111 N. Y. 569, 576, 19 N. E. 279.

If the witness denies the statements or answers that he does not remember making such statements, he may be contradicted, at the proper time, by the testimony of the witness or witnesses who heard the statements made. The most accurate mode of examining an impeaching witness is to ask the precise question which has previously been put to the witness sought to be impeached, but the trial court, in its discretion, may permit the question to be put in a slightly different form than that claimed to have been made, provided the attention of the principal witness is called specifically to the time and place and the testimony of the impeaching witness is a substantial contradiction of the testimony of the principal witness with respect to that statement. *Sloan v. N. Y. C. R. R. Co.*, 45 N. Y. 125; *Hanselman v. Broad*, 113 App. Div. 447, 99 N. Y. S. 404. For an illustration of an insufficient foundation for proof of prior contradictory statements of a witness, see *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854, *Richardson's Cases in Evidence*, p. 1019.

Where the statements which are offered to impeach the testimony of a witness are in writing, it is unnecessary to call the attention of the witness to the time and place and particular language used, but the writing must be shown to the witness and he must be asked whether he wrote or



signed it, in order that he may later have an opportunity for explanation. *Romertze v. East River Nat. Bank*, 49 N. Y. 577; *Gaffney v. People*, *supra*; *Novogrucky v. Brooklyn Heights R. R. Co.*, 125 App. Div. 715, 110 N. Y. S. 28; *Conrad v. Griffey*, 16 How. (U. S.) 38, 14 Law. Ed. 835. The attention of the witness having thus been called to the contradictory statements, the writing may be proved and introduced in evidence by the impeaching party as a part of his case. *Larkin v. Nassau Elec. R. R. Co.*, 205 N. Y. 267, 98 N. E. 465. The admission of the witness that he wrote or signed the written statements adequately proves them. *Romertze v. East River Nat. Bank*, *supra*. If the witness does not admit that he signed the statements, the genuineness of the signature may be proved in any legal way. *Novogrucky v. Brooklyn Heights R. R. Co.*, *supra*.

Testimony which is taken by deposition is subject to impeachment by showing self-contradictory statements, but the same foundation for such impeaching evidence is required as in the case of oral testimony. The fact that it is impossible to give warning as to self-contradictory statements to the witness sought to be impeached, by reason of his death or absence at the time of trial, does not render such statements admissible without the required warning. *Stacy v. Graham*, 14 N. Y. 492; *Harding v. Conlon*, 159 App. Div. 441, 450, 144 N. Y. S. 663; *Conrad v. Griffey*, *supra*; *Mattox v. United States*, 156 U. S. 237, 39 Law. Ed. 409, 15 Sup. Ct. Rep. 337.

Where the witness sought to be discredited is a party to the action, the laying of a foundation is unnecessary, as his statements are treated as admissions and, as such, are received as primary evidence against him. *Blossom v. Barrett*, 37 N. Y. 434, 438, 97 Am. Dec. 747; *Mindlin v. Dorfman*, 197 App. Div. 770, 189 N. Y. S. 265.

### § 581. Impeachment by Showing Bias and Interest.

The disposition of a witness, whether friendly or unfriendly, towards the respective parties to the litigation

may always be shown, for the purpose of enabling the jury to more accurately estimate his credibility. *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242. For the same purpose, it is always competent to show the interest of a witness in the case. *Ryan v. People*, 79 N. Y. 593, 600; *Iaquinto v. Bauer*, 104 App. Div. 56, 93 N. Y. S. 388; *People v. Moy He*, 173 App. Div. 396, 400, 159 N. Y. S. 303. For example, a medical expert may be asked what fee he expects to receive for his services in testifying. *Zimmer v. Third Ave. R. R. Co.*, 36 App. Div. 273, 55 N. Y. S. 314. Evidence tending to show that a witness has been bribed to testify falsely is competent to impeach him. *State v. Smith*, 44 S. D. 305, 183 N. W. 873, 16 A. L. R. 982.

The hostility of a witness may be established by his own admission while on the stand, in answer to a direct question as to his attitude towards one of the parties, or by proving hostile acts or declarations of the witness either by his own testimony on cross-examination or by the testimony of others. *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812, *Richardson's Cases in Evidence*, p. 1014. Any of the same means may be employed to show sympathy, friendship, or affection on the part of a witness towards the party calling him. *People v. Webster*, 139 N. Y. 73, 34 N. E. 730.

It is proper to embody in a question calling for the feelings of the witness a further query as to the cause on which they are based. *People v. Milks*, 70 App. Div. 438, 74 N. Y. S. 1042; *Atwood v. Welton*, 7 Conn. 66. For example, in *People v. Milks*, *supra*, it was held proper to ask a witness for the plaintiff, on cross-examination, whether he understood that the defendant had been instrumental in getting the witness's brother indicted for selling hard cider, and whether by reason of that the witness entertained hard feelings against the defendant.

Although the bias or prejudice of a witness may be proved by the testimony of others, such testimony must be confined to proof of acts or declarations of the witness himself. A witness may not be thus discredited through proof

of the acts, or declarations of others. *Potter v. Browne*, *supra*; *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182.

**§ 582. Extent of Examination to Show Hostility or Bias in Discretion of Court.**

The Court of Appeals said, in *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242, 250, that the evidence to show the hostile feelings of a witness "should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issues in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred." In *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189, *Richardson's Cases in Evidence*, p. 1026, it was held that the extent to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent, at least, within the discretion of the trial judge. But the trial court has no discretionary power to rule out all of the evidence which is offered for this purpose. *Garnsey v. Rhodes*, 138 N. Y. 461, 467, 34 N. E. 199; *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182; *People v. Lustig*, 206 N. Y. 162, 172, 99 N. E. 183.

**§ 583. Preliminary Inquiry of Biased Witness Unnecessary.**

In many jurisdictions a party is not permitted to introduce independent evidence of acts or declarations of a witness for the purpose of showing his bias or hostility without first laying a foundation by calling the attention of the witness to the alleged act or declaration, in order to give him an opportunity to explain it. See authorities collated and reviewed in note to *State v. Smith*, 44 S. D. 305, 183 N. W. 873, in 16 A. L. R. 982. In New York and several other jurisdictions, however, no such foundation is required. *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189, *Richardson's Cases in Evidence*, p. 1026; *Brink v.*

Stratton, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182; People v. Lustig, 206 N. Y. 162, 99 N. E. 183; People v. Michalow, 229 N. Y. 325, 128 N. E. 228, 38 N. Y. Crim. Rep. 429. In the language of the Court, in People v. Brooks, *supra*, at p. 325: "The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence we see no reason for holding that he must first be examined as to his hostility." The Appellate Division attempted, in one case, to make a distinction between hostile acts and mere utterances claimed to show hostility, holding that the latter could not be proved without a preliminary interrogation of the witness himself as to those utterances. People v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814, 20 N. Y. Crim. Rep. 427. The Court of Appeals, however, impliedly overruled this holding by affirming the judgment solely on the ground that the errors in ruling on the evidence might be safely disregarded under the Code of Criminal Procedure, sec. 524. People v. Mallon, 189 N. Y. 520, 81 N. E. 1171. And no such distinction has been recognized by the Court of Appeals in subsequent decisions. People v. Lustig, *supra*; People v. Michalow, *supra*.

#### § 584. Impeachment by Showing Conviction of Crime.

A witness may be impeached by showing that he has been convicted of a crime or has served a term in prison. Real v. People, 42 N. Y. 270, 280; Penal Law, sec. 2444; Civil Practice Act, sec. 350. See authorities collated and reviewed in note to Morrison v. State, 85 Tex. Crim. Rep. 20,

209 S. W. 742, in 6 A. L. R. 1607; also, Editorials, New York Law Journal, March 1 and 2, 1928. But an arrest or indictment may not be shown, because these amount to nothing more than a charge or accusation of guilt. *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287; *People v. Morrison*, 195 N. Y. 116, 88 N. E. 21, 133 Am. St. Rep. 780; *People v. Weber*, 191 App. Div. 271, 181 N. Y. S. 774, 38 N. Y. Crim. Rep. 282; *People v. Latshaw*, 205 App. Div. 449, 199 N. Y. S. 592. A witness cannot be asked if he has been tried for a crime, unless it appears that he was convicted, "because a trial followed by acquittal is but an accusation successfully met." *People v. Cascone*, *supra*, at p. 334. The verdict of a jury upon which a judgment has not yet been rendered may not be proved. Nothing less than an actual conviction will suffice. *People v. Marendi*, 213 N. Y. 600, 616, 107 N. E. 1058. But a conviction may be shown although sentence upon such conviction has been suspended. Code of Crim. Pro., sec. 470b, sub. 2; *Webb v. Dale & Cain, Inc.*, 190 App. Div. 916, 179 N. Y. S. 957. A conviction for violation of a local ordinance is incompetent, because such an offense does not imply moral turpitude. See *v. Wormser*, 129 App. Div. 596, 113 N. Y. S. 1093; *State v. Taylor*, 98 Mo. 240, 11 S. W. 570, 6 A. L. R. 1643. See, also, *People v. Joyce*, 233 N. Y. 61, 71, 134 N. E. 836.

### § 585. How Conviction May Be Shown.

The fact that a witness has been convicted of a crime may be shown by his cross-examination or by the record. At common law proof of conviction by cross-examination was not permitted under an objection that the record was the best evidence, but this rule has been changed by statute in this State. *Spiegel v. Hays*, 118 N. Y. 660, 22 N. E. 1105. The Penal Law, sec. 244, provides that: "A person heretofore or hereafter convicted of any crime, is, notwithstanding, a competent witness, in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by



the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry and the party cross-examining is not concluded by the answer to such question." A similar provision is found in Civil Practice Act, sec. 350. These statutes impliedly prohibit proof of conviction by any other means than those explicitly prescribed. For example, the fact that a witness has served a jail sentence cannot be proved by his own admission out of court. *People v. Cardillo*, 207 N. Y. 70, 100 N. E. 715. A record of the jury's verdict proved by the clerk of the court will not be received as evidence of a conviction. A judgment is necessary to constitute such evidence. *Blaufus v. People*, 69 N. Y. 107, 25 Am. Rep. 148; *People v. Marendi*, 213 N. Y. 600, 107 N. E. 1058.

**§ 586. Impeachment by Showing Intoxication, Illness, etc.**

For the purpose of discrediting the witness's testimonial powers it may be shown that either at the time of the occurrences to which he testified or at the time of the trial the witness was under the influence of drugs or liquor or was ill or mentally deranged. *People v. Webster*, 139 N. Y. 73, 87, 34 N. E. 730; *State v. Prentice*, 192 Iowa 207, 183 N. W. 411, annotated 15 A. L. R. 904; *Green v. State*, 53 Tex. Crim. Rep. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706; *Ellarson v. Ellarson*, 198 App. Div. 103, 190 N. Y. S. 6; 15 A. L. R. 932, *Richardson's Cases in Evidence*, p. 788.

**§ 587. Impeaching One's Own Witness.**

A party cannot, ordinarily, impeach the credibility of his own witness. The reason of this rule is stated by Greenleaf as follows: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their

credibility by general evidence tending to show them to be unworthy of belief, for this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." Greenleaf on Ev., 16th Ed., sec. 442. The rule, although criticised, is recognized as well established and is, therefore, followed, in *People v. DeMartini*, 213 N.Y. 203, 212, 107 N. E. 501. But a party may prove any material fact in the case by other witnesses, even though the effect be to contradict his own witness. *Quick v. Amer. Can Co.*, 205 N. Y. 330, 334, 98 N. E. 80; *Remington Arms Co. v. Cotton*, 190 App. Div. 600, 610, 180 N. Y. S. 486. And, although a party may not offer evidence to impeach the credibility of his own witness, he is not bound by the statements of his witness, even in the absence of contradicting witnesses, provided any material part of the testimony given by his witness is inherently improbable or is contradicted by other evidence in the case even though it be that given by the witness himself. The credibility of a witness is always a question for the jury, and the jury may accept a part of the testimony of the witness as true and disbelieve the rest. *Becker v. Koch*, 104 N. Y. 394, 401, 10 N. E. 701, *Richardson's Cases in Evidence*, p. 1009; *Carlisle v. Norris*, 215 N. Y. 400, 410, 109 N. E. 564; *Title Guarantee & Trust Co. v. Pam*, 232 N. Y. 441, 454, 134 N. E. 525. To illustrate: To establish the defense of fraud, a party called the very person claimed to have perpetrated the alleged fraud. The Court of Appeals held that the party was not bound by the witness's denial of the fraud but was entitled to have the jury pass upon the credibility of this adverse witness and accept the portion of his testimony which was favorable to the party calling him and reject the residue. *Becker v. Koch*, *supra*. It is well settled, in New York, however, that a party may do nothing to impugn the credibility of his own witness, either (1) by offering evidence tending to show him to be a person unworthy of belief; or (2) by showing that he has made statements on other occasions which are inconsistent with his

present testimony; or (3) by showing his hostility, bias, or prejudice.

**§ 588. First. General Character of One's Own Witness.**

A party will not be allowed to discredit his own witness by the testimony of others with respect to his general bad reputation for veracity or by general character evidence tending to show him to be unworthy of belief. For example, a party may not ask his own witness whether he has been guilty of certain immoral or criminal acts or conduct, or whether he has been convicted of a crime. *People v. Minsky*, 227 N. Y. 94, 124 N. E. 126; *People v. Countryman*, 201 App. Div. 805, 808, 195 N. Y. S. 728; *People v. Carnavalle*, 202 App. Div. 156, 196 N. Y. S. 56. In the language of the Court of Appeals, in *People v. Minsky*, *supra*, at p. 98: "The law does not limit a party to witnesses of good character, nor does it compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witnesses and the jury. Men have been convicted of murder in the first degree by the evidence of admittedly dangerous and degenerate witnesses, law breakers and professional criminals." *People v. Becker*, 215 N. Y. 126, 210 N. Y. 274, *Richardson's Cases in Evidence*, p. 470. "But when a disreputable witness is called and frankly presented to the jury as such, the party calling him represents him for the occasion and purposes of the trial as worthy of belief. In the search for truth he may have to press the witness severely. Even the best of men may be an unwilling witness. But he must not thereafter attack the credibility of the witness by general character evidence tending solely to show him to be untruthful and unworthy of belief. Where the only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable."

**§ 589. Second. Prior Self-Contradiction of One's Own Witness.**

A party may not discredit his own witness by showing that he has made statements on other occasions which are inconsistent with his present testimony. *People v. DeMartini*, 213 N. Y. 203, 107 N. E. 501; *People v. Speeks*, 173 App. Div. 440, 159 N. Y. S. 308, and authorities there cited.

While a party cannot prove prior contradictory statements of his own witness to discredit him, he may, if surprised by his testimony, interrogate the witness in respect to previous statements inconsistent with the present testimony, for the purpose of refreshing or probing his recollection, and give him an opportunity to explain the apparent inconsistency. *Bullard v. Pearsall*, 53 N. Y. 230, *Richardson's Cases in Evidence*, p. 1017; *Iveson v. United Traction Co.*, 159 App. Div. 27, 143 N. Y. S. 1077. This is also proper for the purpose of showing the circumstances which induced the party to call him, in order to account for the surprise or to show any deceit practised. *Bullard v. Pearsall*, *supra*; *People v. Speeks*, *supra*. But if the witness should deny having made previous statements inconsistent with his testimony, it would not be proper to allow such statements to be proved by other witnesses. *Bullard v. Pearsall*, *supra*; *People v. DeMartini*, *supra*, at p. 216.

**§ 590. Calling Adverse Party as Witness.**

The rule that one cannot show prior inconsistent statements of his own witness does not apply where the adverse party to the action is called as his witness. In such cases prior inconsistent statements may be shown, since such statements are treated as admissions of a party and, when material, "are always competent evidence against him, wherever, whenever or to whomsoever made," except in the case of privileged communications. *Koester v. Rochester Candy Works*, 194 N. Y. 92, 98, 87 N. E. 77, *Richardson's Cases in Evidence*, p. 596.

But where one makes the adverse party his own witness

he cannot, thereafter, impeach his character for truth and veracity, although he may, of course, dispute or contravert the specific facts testified to. *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333; *Hankinsin v. Vantine*, 152 N. Y. 20, 27, 46 N. E. 292. The Civil Practice Act, sec. 343 provides that: "The testimony of a party, taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence."

### § 591. Third. Adverse or Hostile Witness.

Even though one's own witness proves to be hostile or adverse, it would be error to allow a party producing and examining him to afterwards impeach him by evidence showing his bias or interest in favor of the opponent. *Matter of Mellen*, 56 Hun 553, 9 N. Y. S. 929. Although he may be cross-examined, and leading questions may be put to him by the party calling him, yet this confers no right to impeach. *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, *Richardson's Cases in Evidence*, p. 1009. The right to impeach an adverse witness by showing contradictory statement is subject to many conflicting decisions. See *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, annotated 21 L. R. A. 418. In many states the question is regulated by statute. In New York, however, the rule is well settled that a party cannot show prior-inconsistent statements of his own witness in order to discredit him, however hostile or disappointing he may prove to be. *Bernstein v. Empire Bridge Co.*, 146 App. Div. 529, 131 N. Y. S. 129, *aff'd* 205 N. Y. 603, 98 N. E. 1098; *Power v. Brooklyn Heights R. R. Co.*, 157 App. Div. 400, 142 N. Y. S. 592; *Mason-Jacobs Co., Inc. v. West 129th Street Building Corp.*, 214 App. Div. 414, 212 N. Y. S. 353.

### § 592. Compulsory or Necessary Witness.

The rule as to impeaching one's own witness has no application when the party cannot avoid making a party his witness, as in the case of an attesting witness to a will. Such witnesses are required by law to be produced or accounted for, and, in case they give adverse testimony, they



may be impeached by the party calling them in any way in which an opponent's witness may be impeached; *e. g.*, by proof of general bad reputation for veracity, or by showing prior self-contradictory statements of the witness. *Williams v. Walker*, 2 Rich. Eq. (S. C.) 291, 46 Am. Dec. 53; *Thompson v. Owens*, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682; *Harden v. Hays*, 9 Pa. 151. See, also, *Matter of Cottrell*, 95 N. Y. 329.

### § 593. Who Is One's Own Witness.

Since a party is forbidden to impeach his own witness, the question as to who is one's own witness becomes important. The witness, ordinarily, belongs to the party calling him, but this is not unqualifiedly true, for if a party calling a witness discovers, after a few preliminary questions, that he has made a mistake or does not care to examine the witness further, and later, the witness being called by the opponent, gives for the first time, material testimony, he becomes the witness of the opponent, and not that of the party first calling him. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 52 N. E. 1095, 43 L. R. A. 676; *Valenti v. Mesinger*, 175 App. Div. 398, 404, 162 N. Y. S. 30; *Fine v. Interurban Street Ry. Co.*, 45 Misc. 587, 91 N. Y. S. 43. Generally speaking, therefore, when a witness has given material testimony in behalf of the party first calling him, he becomes his witness as to such testimony. And although the witness is afterwards called by the adverse party it does not render him subject to impeachment either by general evidence or by proof of contradictory statements out of court. *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585; *O'Doherty v. Postal Tel. Cable Co.*, 113 App. Div. 636, 99 N. Y. S. 351; *People v. Speeks*, 173 App. Div. 440, 159 N. Y. S. 308. To illustrate: If A calls a witness, and then B calls him, neither A nor B will be permitted to impeach his testimony, since he is the witness of A and B.

**§ 594. Making a Witness One's Own by Improper Cross-Examination—Adopted Witness.**

Where a witness is cross-examined on new matter; *i. e.*, matter not brought out on the direct examination, the cross-examiner, by exceeding the proper limits of cross-examination, makes the witness his own. The witness having been adopted by the cross-examiner in this way, the same rules as to leading questions and impeachment apply as if he had been called in the first instance by the cross-examiner. In discussing the rule which forbids leading questions on cross-examination while seeking to elicit new matter as an element of defense, the Court, in *People v. Court of Oyer and Terminer*, 83 N. Y. 436, says: "A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to appropriate restraints." Therefore, the right to cross-examine and lead a witness continues only while you keep within the opponent's case and ceases when you strike new matter. *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *Austin v. Bartlett*, 178 N. Y. 310, 70 N. E. 855.

**§ 595. Evidence in Rebuttal.**

After the witnesses for the defense having been examined and cross-examined, the party holding the affirmative may introduce evidence in rebuttal. "Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." *Marshall v. Davies*, 78 N. Y. 414, 420.

It is proper to offer evidence, in rebuttal, to sustain the character of witnesses who have been impeached, or to corroborate testimony which has been discredited.

**§ 596. Sustaining an Impeached Witness.**

When the credibility of a witness is attacked by the adverse party, the party for whom the impeached witness has testified may call other witnesses to testify to his good reputation for truth and veracity in the community in which he lives. See authorities collated and reviewed in 15 A. L. R. 1066. Some confusion is apparent in the earlier decisions in New York as to the form which the impeachment of a witness must take in order to render evidence of his good reputation for veracity admissible. All cases agree that where the credibility of a witness has been attacked by evidence of his general bad reputation for veracity, his credibility may be sustained by introducing evidence of good reputation. *Stape v. People*, 85 N. Y. 390. In *Derrick v. Wallace*, 217 N. Y. 520, 112 N. E. 440, Richardson's Cases in Evidence, p. 1030, the Court of Appeals held that a plaintiff, called as a witness in his own behalf, who testified, on cross-examination, that he had been convicted of forgery, should have been allowed thereafter to call witnesses to testify to his general good reputation in the community in which he lived. In the language of the Court, at p. 525: "Persons convicted of a crime are now competent witnesses, and the only purpose for which conviction can be shown is to affect credibility by suggesting general bad reputation. Evidence of conviction thus impeaches the general character for truth and veracity, and may be met by evidence of general good character."

The mere contradiction of a witness by other evidence does not lay a foundation for testimony as to the general reputation of the witness for veracity. To justify the introduction of such testimony, the character of the witness must first be assailed by some recognized method of impeachment. *Louisville v. McClish*, 115 Fed. 268.

It has been held, in New York and several other juris-

dictions, that evidence of other statements of the witness inconsistent with his testimony does not impeach his general character so as to render evidence of good reputation admissible in rebuttal. *People v. Hulse*, 3 Hill (N. Y.) 309; *Starks v. People*, 5 Denio (N. Y.) 106; *Frost v. McCarger*, 29 Barb. (N. Y.) 617; *Russell v. Coffin*, 8 Pick. (Mass.) 143. For a contrary view, see *Colvin v. Wilson*, 100 Kan. 247, 164 Pac. 284, annotated 6 A. L. R. 859; *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

The rule that a witness is not qualified to testify to the reputation of another for veracity unless it appears that he knows that reputation from the speech of the people in the community in which he resides or transacts business applies only to impeaching witnesses and not to those who are called to sustain the character of an impeached witness. A witness who is called to rehabilitate an impeached witness may testify that he has known the witness and the people with whom he associates for a considerable length of time and that he has never heard his veracity questioned. He may state, also, that he would believe him on oath. *People v. Davis*, 21 Wend. (N. Y.) 309; *Nat. Bank of Troy v. Scriven*, 63 Hun 375, 18 N. Y. S. 277; *People v. Seldner*, 62 App. Div. 357, 363, 71 N. Y. S. 35. See, also, *People v. Van Gaasbeck*, 189 N. Y. 408, 419, 82 N. E. 718, *Richardson's Cases in Evidence*, p. 109, annotated 22 L. R. A. (N. S.) 650. In the language of the Court, in *People v. Davis*, *supra*, at p. 315: "If such a question was not permitted, the most respectable man in the community might fail in being supported if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet, undoubtedly, be competent to sustain him." In *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166, it was held that a sustaining witness, who testified that he did not know "from the speech of people" what the character of the impeached witness for truth and veracity was, but that he knew it from his own knowledge

and that he was well acquainted in the neighborhood and had heard the man's character questioned, was competent to answer the question whether he would believe the witness on his oath.

**§ 597. Previous Statements of Witness Consistent with His Testimony.**

A party may not, ordinarily, bolster up the testimony of his witness by showing that he has previously made statements of the same tenor. Such prior statements are inadmissible as mere hearsay declarations of the witness. *Zuckerman v. N. Y. C. Ry. Co.*, 117 App. Div. 378, 102 N. Y. S. 641; *Rogers v. State*, 88 Ark. 451, 115 S. W. 156, fully annotated 41 L. R. A. (N. S.) 857; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 Law. Ed. 475. But where the testimony of the witness has been assailed as a recent fabrication, proof of prior consistent statements of the witness made at a time when there was no motive to falsify, may be received in order to repel such imputation. *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, *Richardson's Cases in Evidence*, p. 210; *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, *Richardson's Cases in Evidence*, p. 1023; *Commonwealth v. Retkovitz*, 222 Mass. 245, 110 N. E. 293.

On a trial for rape, the testimony of the complaining witness may be corroborated by evidence that she made immediate complaint of the injury to her mother or other confidant.

**§ 598. Re-examination of Witness.**

The purpose of a re-examination is to rehabilitate a witness. Thus, on a cross-examination by the opponent, many apparent inconsistent statements may be brought out, and on a re-examination these apparent inconsistencies may be harmonized so as to make the witness's testimony, as a whole, consistent and clear. *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Caffi v. N. Y. C. & H. R. R. Co.*, 49 Misc. 620, 96 N. Y. S. 835. Again, if only a part of a writing or statement is drawn out on cross-examination, the other



parts may be introduced in a redirect examination of the witness for the purpose of explaining or qualifying the writing or statement. *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846.

Although there is no positive rule which prevents a party on a redirect examination from examining the witness as to matters which have been overlooked or not known on direct examination, *Clark v. Vorce*, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53, yet it should usually be confined to matters brought out on cross-examination. *People v. Barone*, 161 N. Y. 451, 471, 55 N. E. 1083; *People v. Zigouras*, 163 N. Y. 250, 255, 57 N. E. 465.

### § 599. Privilege of Accused against Testifying.

An accused person is not compelled to testify on his own trial. This privilege is absolute. And his refusal to testify does not create any inference or presumption that may be used against him. Code of Crim. Pro., sec. 393; *People v. Courtney*, 94 N. Y. 490, 1 N. Y. Crim. Rep. 573.

Counsel may not, in summing up to the jury, refer to the fact that the defendant refrained from testifying, and a conviction will be reversed for error in this respect, where the court fails to direct the jury to disregard it. *People v. Minkowitz*, 220 N. Y. 399, 115 N. E. 987.

### § 600. Privilege Constitutional.

The privilege is constitutional, and a statute compelling the defendant in a criminal action to testify would violate the constitutional provision which protects persons accused of crimes from being compelled to testify against themselves. Constitution of New York, Art. 1, sec. 6; Constitution of the United States, Amendment 5.

### § 601. Extent of Privilege.

The constitutional privilege against compelling an accused person to testify refers ~~only~~ to an oral examination before or upon trial. The accused may be required to furnish evidence against himself by compelling him to exhibit any

portion of his body for evidence marks and bruises; by forcibly taking him before a dying victim for identification; by searching him for stolen property, and by requiring him to submit to certain measurements. See *People v. Van Wormer*, 175 N. Y. 188, 195, 67 N. E. 299, *Richardson's Cases in Evidence*, p. 1037, where it was held that the seizure of shoes of the accused to compare with foot prints did not violate the rule in question; *i. e.*, compel the accused to be a witness against himself. See, also, *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699; *People v. Sallow*, 100 Misc. 447, 165 N. Y. S. 915.

### § 602. Waiver of Privilege by Accused.

The accused may waive his constitutional privilege by testifying in his own behalf and when he does so he places himself in the position of an ordinary witness. The state may make such a waiver a condition precedent to the exercise of some privilege such as securing an operator's license to drive a car, in which instance the operator must agree to waive either as a whole or in part his constitutional right, and report the circumstances of accidents in which he has been involved. *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, *Richardson's Cases in Evidence*, p. 1033. The accused may be compelled, on cross-examination, to answer any question material to the case which would, in the case of any other witness, be legitimate cross-examination. *People v. Tice*, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669, *Richardson's Cases in Evidence*, p. 1041; *People v. Dupounce*, 133 Mich. 1, 94 N. W. 388, 103 Am. St. Rep. 435. Other witnesses may be called to impeach his credibility by any means which may be used to impeach any other witness; *e. g.*, by testifying to his bad reputation for veracity. *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676, *Richardson's Cases in Evidence*, p. 117. On cross-examination he may be interrogated concerning any immoral or criminal acts of his life for the purpose of affecting his credibility as a witness. There is a conflict of authority as to whether the accused may, like any other witness, refuse to answer such

questions on the ground that his answers would subject him to criminal liability, or whether the waiver of his constitutional privilege against testifying acts as a complete waiver even as to matters which are not relevant to the charge on trial. Wigmore on Ev., sec. 2276. But, in either view, unless the privilege is claimed in connection with the particular question asked, the accused may be compelled, like any other witness, to testify concerning specific acts for the purpose of affecting his credibility. *People v. Johnston*, 228 N. Y. 332, 340, 127 N. E. 186.

**§ 603. Privilege of Ordinary Witness against Incrimination.**

No witness, in any legal proceeding, can be required to answer questions which will tend to show that he is guilty of a crime. The matters that are privileged include everything which would tend to subject the witness to

1. A fine or imprisonment;
2. A forfeiture or confiscation of land; or
3. A penalty.

Civil Practice Act, sec. 355; Constitution of New York, Art. 1, sec. 6; Constitution of the United States, Amendment 5; *Henry v. Bank of Salina*, 1 N. Y. 83; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303. But the privilege does not extend to matters which might be used against the witness in a civil suit. Civil Practice Act, sec. 355; *Matter of Kip*, 1 Paige Ch. (N. Y.) 601.

The privilege against self-incrimination applies to the examination of a witness in civil, as well as criminal cases. *Chappell v. Chappell*, 116 App. Div. 573, 579, 101 N. Y. S. 846.

**§ 604. Witness to be His Own Judge.**

The witness is to be his own judge as to whether his answer will tend to incriminate him, except where the court is convinced that there is no substance to his claim and that his refusal to answer is a mere device to shield a third

party. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 266, 68 N. E. 353; *Matter of Cappeau*, 198 App. Div. 357, 190 N. Y. S. 452; *Ex parte Gauss*, 223 Mo. 277, 122 S. W. 741, 135 Am. St. Rep. 517; *Mason v. United States*, 244 U. S. 362, 61 Law. Ed. 1198, 37 Sup. Ct. Rep. 621.

### § 605. Statutes Unconstitutional.

A statute which infringes the constitutional privilege of a witness is unconstitutional. *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 90 N. E. 829.

### § 606. When Incriminating Matter Is Not Privileged.

Matter, although incriminating, is not privileged where it will not tend to subject the witness to any legal penalty, and it will not have this effect where

1. The witness was previously tried and convicted or acquitted.

2. The statute of limitations has run against the offense. *Close v. Olney*, 1 Denio (N. Y.) 319; *Meyer v. Mayo*, 173 App. Div. 199, 159 N. Y. S. 405.

3. The legislature has, in advance, granted immunity to those who testify. But the immunity granted by statute must be as broad as the privilege of the witness. For example, a statute which grants immunity to a witness by providing that no evidence given by him shall be, in any manner, used against him in any criminal proceeding, is not coextensive with the constitutional provision which protects him from incriminating himself, since it does not prevent the use of evidence against him which may be obtained through his testimony. It simply excludes his own testimony. *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353; *Counselman v. Hitchcock*, 142 U. S. 547, 35 Law. Ed. 1110, 12 Sup. Ct. Rep. 195; *Arndstein v. McCarthy*, 254 U. S. 71, 65 Law. Ed. 138, 41 Sup. Ct. Rep. 26, *Richardson's Cases in Evidence*, p. 1050. But a statute which provides that such a witness shall not "be prosecuted or subjected to any penalty or forfeiture for or on account

of any transaction, matter or thing, concerning which he may so testify or produce evidence, documentary or otherwise," affords complete immunity from prosecution for any crime in relation to the acts about which he is interrogated, and consequently does not contravene section 6 of Article 1 of the Constitution, which provides that no person shall "be compelled, in any criminal case, to be a witness against himself." *People ex rel. Lewisohn v. General Sessions*, 96 App. Div. 201, 89 N. Y. S. 364, *aff'd* 179 N. Y. 594, 72 N. E. 1148, *Richardson's Cases in Evidence*, p. 1046; *Penal Law*, sec. 996.

Where the statutory immunity is as broad as the offense charged, compulsory answers to questions do not violate the privilege of the accused under either State or Federal Constitution. *People ex rel. Fennell v. Wilmot*, 127 Misc. 791, 217 N. Y. S. 477. A statute which grants complete immunity only as to certain offenses will not protect the witness as to others. *Heike v. United States*, 227 U. S. 131, 57 Law. Ed. 450, 33 Sup. Ct. Rep. 226. In such cases, therefore, a witness may claim his privilege as to incriminating matters which might be disclosed incidentally.

When the danger of prosecution has been removed by an executive pardon, the witness cannot invoke his privilege. *Wigmore on Ev.*, sec. 2280. But a witness has a right to refuse a pardon and decline to testify. *Burdick v. United States*, 236 U. S. 79, 59 Law. Ed. 476, 35 Sup. Ct. Rep. 267.

### § 607. Time for Invoking or Waiving Privilege.

The time for asserting the privilege is at the outset of the examination with respect to the incriminating matters, and a failure to claim the privilege operates as a waiver of it. "A person cannot waive his privilege under the constitutional provisions and give testimony to his advantage or the advantage of his friends, and at the same time and in the same proceeding assert his privilege and refuse to answer questions that are to his disadvantage or the disadvantage of his friends." *People v. Cassidy*, 213 N. Y. 388, 394, 107 N. E. 713. See, also, *Amer. Blue Stone Co. v.*



Cohn Cut Stone Co., 98 Misc. 439, 445, 164 N. Y. S. 506; *Foster v. Pierce*, 11 Cush. (Mass.) 437, 59 Am. Dec. 152.

The questioning of a defendant who takes the witness stand on a second trial as to why he had not taken the witness stand on the first trial is relevant and competent. The constitutional privilege of the accused not to give evidence against himself ceases to operate when he takes the witness stand. *Raffel v. United States*, 271 U. S. 494, 70 Law. Ed. 1054, 46 Sup. Ct. Rep. 566.

### § 608. Privilege is Personal to Witness.

The privilege is personal to the witness, and counsel cannot make the objection. *N. Y. Life Ins. Co. v. People*, 195 Ill. 430, 63 N. E. 264. The ruling of the court is not open to an exception. If the witness is ordered to testify, it is a matter exclusively between the court and the witness. A party has no right to object to the testimony. *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *People v. Bodine*, 1 Denio (N. Y.) 281. But the counsel of a party witness may object and except on the ground of the witness's privilege, and an error is available on appeal. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183.

### § 609. Inferences.

No inference as to the truth of the facts inquired about is to be drawn from the exercise of the privilege. *Dovendinger v. Tschechtelin*, 12 Daly (N. Y.) 34; *Beach v. United States*, 46 Fed. 754. But it has been held that where a party witness claims his privilege against self-incrimination, counsel for the opponent may comment on his refusal to testify as to the particular matters in question. *Morris v. McClellan*, 154 Ala. 639, 45 So. 641.

### § 610. Exposure to Disgrace.

A witness may be compelled to answer a question which is material to the issue, even though his answer may tend to disgrace him. But where the inquiry is as to a collateral

matter, the witness cannot be compelled to answer. For example, a witness who is interrogated, on cross-examination, concerning immoral acts, for the purpose of impairing his credibility, may refuse to answer on the ground that his answer would tend to disgrace him. *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340; *Meyer v. Mayo*, 173 App. Div. 199, 159 N. Y. S. 405. In practice, this privilege is seldom invoked, for the obvious reason that a refusal to answer on this ground is substantially equivalent to an admission of the disgraceful fact. *Wigmore on Ev.*, sec. 984. A stronger protection is afforded the witness by the rule that the extent to which said disparaging questions, not relative to the issue, may be put is discretionary with the trial court.

### § 611. Objections to Evidence.

The general practice of the courts is to receive all evidence when offered unless objected to. The trial court need not wait for an objection, but may take the initiative and exclude the testimony of its own motion. *Farmers' & Manufacturers' Bank v. Whinfield*, 24 Wend. (N. Y.) 419. The initiative is ordinarily left to the opponent, however, and if he fails to make timely objection, he will, as a general rule, be held to have waived his right to object. *Gregory v. Dodge*, 14 Wend. (N. Y.) 593, 617; *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 52 N. E. 650. The objection should be made at the time when the evidence is offered, and a failure to object at that time through neglect or inadvertence cannot be cured by a motion to strike out the evidence. *Quin v. Lloyd*, 41 N. Y. 349, *Richardson's Cases in Evidence*, p. 1054; *Parkhurst v. Berdell*, 110 N. Y. 386, 393, 18 N. E. 123, 6 Am. St. Rep. 384, *Richardson's Cases in Evidence*, p. 875; *Benson v. United States*, 146 U. S. 325, 36 Law. Ed. 991, 13 Sup. Ct. Rep. 60. But a motion to strike out testimony should be granted where a witness answers so promptly that there is not time in which to object, *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; or where the witness gives an improper answer to a proper question, *Platner v. Platner*, 78 N. Y. 90, 102.

A mere declaration by counsel of a desire to offer evidence on a certain point when no witness is on the stand does not constitute an offer, and an objection at that time would be unavailable on appeal. *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087.

### § 612. Form of Objection.

The specific ground of objection should always be stated at the time when the objection is made, and an objection which does not state the particular reason why the evidence is inadmissible is not available on appeal unless there is some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature is incompetent. *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 Law. Ed. 1006, 15 Sup. Ct. Rep. 830; *Wightman v. Campbell*, 217 N. Y. 479, 482, 112 N. E. 184. To illustrate: Where certain documents were objected to as "immaterial, irrelevant and incompetent," it was held that this general objection was not sufficient to exclude the documents on the ground that they were not properly authenticated. In the language of the Court: "The rule is universal, that where an objection is so general as not to indicate the specific ground upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the ground upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done." *Noonan v. Caledonia Gold Mining Co.*, 121 U. S. 393, 30 Law. Ed. 1061, 7 Sup. Ct. Rep. 911. If evidence objected to generally is not, in its essential nature, incompetent, all grounds of objection which might have been obviated if specifically stated must be deemed, on appeal, to have been waived. *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, *Richardson's Cases in Evidence*, p. 1056.

Attorneys frequently fall into the bad habit of objecting

to evidence generally as "incompetent, irrelevant and immaterial." These words have been defined as follows: "An objection to evidence that it is irrelevant is sufficiently specific; it means that it does not bear on any issue in the case, and 'immaterial' means nearly the same. . . . But an objection on the ground that the evidence offered is incompetent without a specification in what respect it is believed to be so is really no objection at all." *Stoner v. Royar*, 200 Mo. 444, 98 S. W. 601. Where, therefore, the evidence offered is not material to any issue in the case, it may properly be objected to on that ground. *M. Groh's Sons v. Groh*, 177 N. Y. 8, 14, 68 N. E. 992, *Richardson's Cases in Evidence*, p. 1060. But an objection to the admission of a paper as "incompetent and immaterial" is not sufficient to raise the question, on appeal, that the paper was improperly admitted because it was a copy and not the original writing. *Atkins v. Elwell*, 45 N. Y. 753. The reason for the rule is stated, in *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, as follows: "The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time—and thus appeals could often be saved, delays avoided, and substantial justice administered."

The rule that the objection should be specific has no application, however, where a general objection is sustained by the trial judge. In the language of the Court, in *Tooley v. Bacon*, 70 N. Y. 34, at p. 37: "When evidence is excluded upon a mere general objection, the ruling will be

upheld, if any ground in fact existed for the exclusion. It will be assumed, in the absence of any request by the opposing party of the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground." See, also, *Rosenberg v. Sheahan*, 148 Wis. 92, 133 N. W. 645.

### **§ 613. The Exception.**

An exception to the ruling of the trial court is necessary in order to preserve the right of the injured party on appeal. The functions of an objection and exception are distinct. No matter how clearly an objection will lie, the exception is still necessary. If an exception is not taken at the trial, the party will be deemed to have waived it. *Poole v. Fleegee*, 11 Pet. (U. S.) 185, 211, 9 Law. Ed. 680.



## CHAPTER XXVI.

### DOCUMENTARY EVIDENCE

#### Public Documents

#### § 614. Documentary Evidence Defined.

A document is "any substance having any matter expressed or described upon it by marks capable of being read," and when "produced for the inspection of the court or judge, such documents are called documentary evidence." Chase's Stephen's Digest of Ev., p. 3. Documents are also defined as, "The deeds, agreements, title-papers, letters, receipts, and other writings to prove a fact." Bouvier's Law Dictionary.

#### § 615. Classification of Documents.

All writings may be divided into two classes; *viz.*, public or official documents and private documents. Public or official documents include all writing or records made by public officers in any of the three departments of government, setting forth facts which such officers are required, in the performance of the duties of their office, to record. Greenleaf on Ev., 16th Ed., sec. 470; Wigmore on Ev., sec. 1630; Chamberlayne's Modern Law of Ev., Vol. V., sec. 3354. All other writings are private documents.

#### § 616. Public Documents Admitted without the Testimony of the Officer Who Made the Record.

Public documents, when otherwise competent, are admissible, as evidence of the facts therein stated, without the testimony of the officer who made the record. See authorities collated in 22 C. J., p. 791, note 18. This is an exception to the Hearsay Evidence Rule, and rests mainly upon the very great inconvenience that would result in requiring the official's attendance. In addition to the inconvenience or necessity principle which is found in all Hearsay excep-

tions, there is also the other requisite of trustworthiness arising out of official duty to make the record. The reason for the admissibility of public records is clearly set forth in the following passage: "Official registers or books kept by persons in public office, in which they are required to write down particular transactions, or to enroll or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth,—the obligation of an oath and the power of cross-examining the persons on whose authority their truth and authenticity may depend. This has been said to be because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty." *Ferguson v. Clifford*, 37 N. H. 85, 95. See, also, *Gaines v. Relf*, 12 How. (U. S.) 472, 570, 13 Law. Ed. 1071. The right of an accused in a criminal proceeding to confront the witnesses who testify against him is not violated by the introduction of public documents. *Heike v. United States*, 192 Fed. 83; *Commonwealth v. Slavski*, 245 Mass. 405, 140 N. E. 465.

### § 617. Authentication Required.

Before a public document can be received in evidence, it must be shown that the document is what it purports to be. *Jackson v. Miller*, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316. The proper official seal or signature on a document made by an officer of this state or of the federal government is sufficient proof of the authenticity of the document without further identification, for the reason that the court takes judicial notice of the authority of the officer and of his official seal and signature. But if the document fails to show the proper authentication on its face, it may be established by other means. *Glaspie v. Keator*, 56 Fed. 203. Proof that the document was taken from the proper official custody may be sufficient. Or the proper custodian, or his predecessor in office, may testify to its authenticity. *Chamberlayne's Modern Law of Ev.*, Vol. V., sec. 3361,

### § 618. Proof of Public Document by Means of Copy.

Since public documents necessarily belong to a particular custody from which they cannot be taken without special authority, because of the inconvenience and danger of loss attending their removal, it would often be impossible to produce them in court. For that reason, public documents may be and usually are proved by means of duly authenticated copies. Chamberlayne's *Modern Law of Ev.*, Vol. V., sec. 3461; 22 C. J., p. 819; *Jones v. Randall*, 1 Cowp. 17, 98 Eng. Rep. 944. The Civil Practice Act, therefore, provides for the introduction in evidence of various official documents and records by means of certified, exemplified, or sworn copies. Civil Practice Act, secs. 366-402; Carmody's *New York Practice*, p. 407, note 49. It becomes important, therefore, to understand clearly the distinction between these different modes of authentication.

### § 619. Certified Copy Defined.

A certified copy is a copy to which is added a certificate under the hand and official seal of the public officer who is authorized to certify the same, stating that the said officer has compared the copy with the original document on file in his office and that the same is a correct transcript thereof and of the whole of the original. Civil Practice Act, secs. 329 and 330.

### § 620. Form of Certificate of Clerk to Copy of Paper on File in his Office.

STATE OF NEW YORK,                    }  
COUNTY OF..... } ss.:

I, John Doe, Clerk of the County of.....  
in the State of New York, and also Clerk of the Supreme  
Court in said County, do hereby certify that the foregoing  
is a true copy of an original ..... on file in  
my office, and further certify that said..... has  
been compared by me with the original thereof, and that  
the foregoing is a correct transcript therefrom, and of the  
whole of said original.

In witness whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed at .....in said County and State, this ..... day of ..... in the year of our Lord, one thousand nine hundred and .....

(SEAL)

JOHN DOE, Clerk.

### § 621. Who May Certify.

A copy may be certified by any person who is given express authority, by statute, to certify the same, usually the legal custodian of the record. Where no express authority to certify a copy of a particular document is given by statute, it is held that the person who has official custody of a public document has implied authority to certify copies thereof, and a copy certified by him is admissible in evidence in any case where the original record would be admissible. Chamberlayne's Modern Law of Ev., Vol. V., secs. 3466 and 3468.

### § 622. Authentication of Certified Copy.

The court will take judicial notice of the identity and authority of a certifying officer of the state or federal government and of his signature and official seal, so that no further authentication is required than that which appears on the face of the certified copy itself.

### § 623. Exemplified Copy Defined.

An exemplified copy is a copy which, in form, is made in the name of the sovereign power; *e. g.*, "The People of the State of New York." Originally, an exemplified copy was sealed with the great seal of the state, but as the great seal is kept with the Secretary of State, that practice has been abolished in the United States, and an exemplified copy is now sealed with the seal of the court where the original record is on file. Greenleaf on Ev., 16th Ed., sec. 501. The certificate of exemplification which is attached to the copy of the record (see form below) is signed by the clerk of the court.

Exemplified copies are used chiefly in proving judicial records. In legal effect an exemplified copy does not differ from a certified copy. The difference is purely a matter of form, but statutes and custom are responsible for the practice of proving certain documents by means of certified copies and others by means of exemplified copies.

**§ 624. Form of Exemplified Copy of a Will on File in the New York Surrogates' Court, New York County.**

*The People of the State of New York,*

By the Grace of God Free and Independent,

To all to whom these presents shall come or may concern,  
GREETING: *Know Ye*, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining a certain record of the last will and testament of.....deceased, said will having been duly executed and proven agreeably to the laws and usages of the State of New York and admitted to probate as a will of real and personal property on the..... day of....., one thousand nine hundred..... in the words and figures following to wit:

(SEAL)

(Here follows an exact copy of the will.)

All of which we have caused by these presents to be exemplified, and the seal of our said Surrogates' Court to be hereunto affixed.

(SEAL)

Witness, Hon....., a Surrogate of the County of New York, at The City of New York, the.....day of....., in the year of our Lord one thousand nine hundred and.....and of our independence the one hundred and.....

Clerk of the Surrogates' Court.

**§ 625. Examined or Sworn Copy Defined.**

An examined or sworn copy is a copy which is proved by the testimony of a witness who has compared the copy with the original record, word for word, or who has examined



the copy, word for word, while another person read the original aloud to him. 22 C. J., p. 825; *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116.

Statutes which prescribe a method of proving particular records are held not to be exclusionary, unless they are expressly made so. Civil Practice Act, sec. 344; *Jacobi v. Order of Germania*, 73 Hun 602, 26 N. Y. S. 318. Therefore, an examined or sworn copy is admissible even in a case where a statute provides for the use of a certified copy. Chamberlayne's *Modern Law of Ev.*, Vol. V., sec. 3465. It is undoubtedly the safer practice, however, to use the particular mode of proof prescribed by statute in a given case. But if a certified or exemplified copy is rejected for a defect in its authentication, counsel may resort to a sworn copy for proof.

#### **§ 626. Modes of Proving Public Records. Judicial and Non-Judicial.**

For convenience in considering the modes of proving various public documents, we may classify public records as judicial and non-judicial.

#### **§ 627. Judicial Records. Same Jurisdiction.**

The New York practice in the matter of proving a judicial record of a court of record within the State is to produce a certified copy. Proof by certified copy, permitted at common law, is expressly sanctioned by statute. Civil Practice Act, sec. 382.

A court will always take judicial notice of its own records in the case at bar. *Ritchey L. Corp. v. Robertson Cole D. Corp.*, 199 App. Div. 362, 191 N. Y. S. 870. It has been held in New York that a court may take judicial notice of a record of the same court in another action. *Matter of Ordway*, 196 N. Y. 95, 89 N. E. 474, *Richardson's Cases in Evidence*, p. 1064; *Devine v. Melton*, 170 App. Div. 280, 156 N. Y. S. 228. This is contrary to the great weight of authority in other jurisdictions. See authorities collated in 23 C. J., p. 113, note 40. When it is necessary to prove a

record of the same court, the original record, being on file in that court, may be used instead of a copy, at the option of the party offering it. Chamberlayne's Modern Law of Ev., Vol. V., sec. 3375.

The Civil Practice Act, sec. 387, provides for the manner of proving proceedings before a justice of the peace.

**§ 628. Foreign Judicial Record Proof under Federal Statute.**

The judicial records of another state are entitled to full faith and credit under the Constitution of the United States, which provides that: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Constitution of the United States, Art. 4, sec. 1.

The act of Congress passed to give effect to this provision provides that, "The records and judicial proceedings of the courts of any State or Territory, or of any such country (one subject to the jurisdiction of the United States), shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." U. S. Revised Statutes, sec. 905; U. S. Compiled Statutes, sec. 1519.

The practice under this statute is to produce an exemplified copy of the record with a dual certificate attached; *i. e.*, the judge certifies that the clerk's signature and the seal of the Court are genuine and that the attestation of the clerk is in due form, and the clerk, in turn, certifies that the signature of the judge is genuine. See Bradbury's

Lawyers' Manual, 2nd Ed., (1923), p. 546, form 332. Strict compliance with the requirements of the statute is essential. For example, the record must be proved by the attestation of the clerk, and the attestation of a deputy-clerk is held insufficient. *Morris v. Patchin*, 24 N. Y. 394, 83 Am. Dec. 311. And, where it appears that there are more judges than one of the court from which the record emanates, the certificate must be that of the chief justice or presiding magistrate. *People v. Smith*, 121 N. Y. 578, 24 N. E. 852; *Gustavus v. Dahlmer*, 98 Misc. 462, 163 N. Y. S. 132.

### § 629. Federal Judicial Records.

As both state and federal courts take judicial notice of the seals of the federal courts, the great weight of authority supports the rule that federal judicial records may be proved in both state and federal courts by means of certified copies, without further authentication. 22 C. J., p. 843. The practice has been quite general, however, especially in the federal courts, to use the dual certificate required for the proof of judicial records of one state to be used in another state. *O'Hara v. Mobile & O. R. R. Co.*, 76 Fed. 718. This is unnecessary in New York. The Civil Practice Act, sec. 399, provides that:

"A copy of the record, or any other proceeding, of a court of the United States, is evidence when certified by the clerk or officer in whose custody it is required by law to be."

A judgment of the United States Court decreeing that the premises have been used for the sale of liquor is binding on the defendant in a summary proceeding brought for the removal of the defendant from possession of premises, especially where the defendant in the proceeding in the Federal Court admitted that it had been so used. *Broadway Central Securities Corporation v. Buchanan Restaurant Co., Inc.*, 218 App. Div. 594, 218 N. Y. S. 539.

### § 630. Judicial Records of Foreign Country.

A record of a court of a foreign country may be proved by means of a copy certified by the clerk of the court or

the legal custodian of the record, but the genuineness of the certification must be authenticated by the certificate of the chief judge or presiding magistrate, and the genuineness of the judge's certificate must be authenticated by the certificate of the secretary of state or other officer having the custody of the great seal of the government under whose authority the court is held. Civil Practice Act, sec. 395. See Bradbury's Lawyers' Manual, 2nd Ed. (1923), p. 551, form 334. This is the usual and most approved mode of proving records of courts of foreign countries, but the Civil Practice Act, sec. 396, provides that a copy of such a record, attested by the seal of the court in which it remains, must also be admitted in evidence upon due proof of the following facts:

"1. That the copy offered has been compared by the witness with the original and is an exact transcript of the whole of the original.

2. That the original was, when the copy was made, in the custody of the clerk of the court or other officer legally having charge of it.

3. That the attestation is genuine."

#### MODES OF PROVING NON-JUDICIAL PUBLIC RECORDS

##### § 631. Statutes of the Forum. Public and Private.

A state court will always take judicial notice of the public statutes of its own state and of the United States, and it is, therefore, unnecessary to introduce such statutes in evidence. In practice, however, it is often necessary to have such statutes before the court for the purpose of refreshing the judge's memory. The Civil Practice Act contains a provision for reading State legislative acts in evidence from any official volume. Section 380 provides that:

"A statute or joint resolution passed by the legislature of the state may be read in evidence from a newspaper, designated as prescribed by law to publish the same, until six months after the close of the session at which it was

passed; and, at any time, from a volume printed under the direction of the secretary of state. To entitle any copy of a law published, other than those published under the direction of the secretary of state, to be read in evidence, there shall be contained in the same book or pamphlet a printed certificate of the secretary of state, that such copy is a correct transcript of the text of the original laws. For such certificate the secretary of state shall collect such a fee as he shall deem just and reasonable."

This provision greatly facilitates the proof of private statutes, which are not judicially noticed, as it dispenses with the necessity of producing copies duly authenticated by officers of the state. In pleading a private statute, it is sufficient to set forth the chapter, year, and title, without setting forth the contents thereof. Rules of Civil Practice, Rule 98.

### **§ 632. Proof of Local Ordinances.**

The ordinances of a city, village, local board of health, or of a board of supervisors may be read in evidence from an official printed volume, or they may be proved by a certified copy. Civil Practice Act, sec. 388. Courts will not, ordinarily, take judicial notice of ordinances, but, under the Greater New York Charter, sec. 1556, all courts situated within the limits of the City of New York are required to judicially notice New York City ordinances.

### **§ 633. Foreign Statutes.**

Courts do not judicially know foreign law, written or unwritten. Therefore, the statutes of other states or of foreign countries are facts which must be pleaded and proved. Such proof may be made by means of a copy authenticated by the certificate of the secretary of state of the state or country of which the statute is a law, with the great seal of the state affixed thereto. U. S. Revised Statutes, sec. 905. See Abbott's Practice and Forms, p. 1720. A foreign statute may also be proved by the production of an official printed volume containing the law,



and this is the more usual method. The Civil Practice Act, sec. 391, provides that:

"A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted, as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance."

In *Pacific Pneumatic Gas Co. v. Wheelock*, 80 N. Y. 278, a book, purporting to contain the statutes of the state of California, was held sufficiently authenticated by the testimony of a member of the California bar that the volume was an official copy, published by the state printer and that it was the edition recognized by the California courts. The mere reading of a statute of another state, and the oral testimony of a lawyer of such state that such is a statute of the state is not sufficient. *Taylor v. Chamberlain*, 6 App. Div. 38, 39 N. Y. S. 737. But the production of books, purporting upon their title pages to be the statutes of another state, and to have been published by that state, under a resolve of a date given and so published by the state printers, is a sufficient authentication of the statutes contained therein. *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 396, 51 N. Y. S. 704. There is no difference in the rule as applied to proof of statutes of foreign countries. *Hynes v. McDermott*, 82 N. Y. 42, 54; *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 52 N. E. 650.

### § 634. Unwritten Foreign Law.

The official books of reports of cases adjudged in the courts of another state or a foreign country are admissible as presumptive evidence of the unwritten or common law of that state or country. Civil Practice Act, sec. 391. In *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 396, 51 N. Y. S. 704, volumes proved by a member of the Mass-

achusetts bar to be "regular reports of the Massachusetts Supreme Court" were held admissible as evidence of the common law of Massachusetts. But a mere citation of a foreign decision with an offer to hand the book to the judge to read is not equivalent to offering the decision in evidence. *DeMaio v. Standard Oil Co.*, 68 App. Div. 167, 74 N. Y. S. 165.

Unwritten foreign law may, also, be proved by the testimony of a competent witness, usually a member of the bar of the state or country in question. Civil Practice Act, sec. 391; 22 C. J., pp. 540, 541.

### **§ 635. Certified Copies of Records—State.**

The Civil Practice Act, sec. 382, provides for proof, by means of certified copies, of records kept, pursuant to law, in a public office of the state.

### **§ 636. Certified Copies of Records—Federal.**

Copies of any documents, records, books, or papers in any of the departments or public offices of the United States Government, authenticated by the seal of the respective departments, are admissible in evidence equally with the originals thereof. U. S. Revised Statutes, secs. 882-892; *Ballew v. United States*, 160 U. S. 187, 40 Law. Ed. 388, 16 Sup. Ct. Rep. 263. The Civil Practice Act, sec. 400, provides for the proof of such documents by means of certified copies.

### **§ 637. Certified Copies of Foreign Records.**

The Civil Practice Act, sec. 398, provides for proof of public records of foreign countries by means of certified copies and prescribes the authentication which is necessary in order to render such certified copies admissible. Where an attempt is made to prove documents under this section, the statutory requirements must be strictly complied with. *People v. Todoro*, 224 N. Y. 129, 120 N. E. 135.

**§ 638. Registers of Conveyances.**

From early times statutes have existed providing for the recording of conveyances of land which have been duly proved or acknowledged; and providing, also, that such records, or duly authenticated transcripts thereof, should be received in evidence with like effect as if the original deed had been produced. Wigmore on Ev., sec. 1648.

The Real Property Law, sec. 291, provides for the recording of conveyances of real property, duly acknowledged or proved, in the office of the clerk of the county where the property is situated. The succeeding sections of the Recording Act (Real Prop. Law, Art. 9) provide for the requisite certificate of acknowledgment or proof to entitle a conveyance to be so recorded. The Civil Practice Act, sec. 384, provides, in part, that

"1. A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence without further proof thereof.

2. Except as otherwise specially prescribed by law, the record of a conveyance duly recorded within the state, or a transcript thereof, duly certified, is evidence with like effect as the original conveyance."

"The term 'conveyance' includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected \* \* \* ; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property." Real Prop. Law, sec. 290. Therefore, a lease for less than three years, although recorded in the register's office, may not be proved by means of a certified copy, under this section. The Best Evidence Rule requires that the original lease must be produced or its absence accounted for before secondary evidence of its contents can be received. *Goodman v. Greenberg*, 53 Misc. 583, 103 N. Y. S. 779.

### § 639. Acknowledgment Defined.

An "acknowledged" deed or other instrument is one to which is attached a certificate of a notary public, commissioner of deeds, or other officer designated by statute (Real Prop. Law, secs. 298-301) that the person purporting to have executed the said instrument appeared personally before the said officer and acknowledged that he executed the same. The Real Property Law, sec. 303, provides that: "An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed the instrument."

### § 640. Form of Acknowledgment.

The usual short form of certificate of acknowledgment follows:

STATE OF NEW YORK,	} ss.:
County of .....	
City of .....	

On this .....day of ....., 19 ,  
before me personally appeared Richard Doe, to me known  
and known to me to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same.

(Signature and title of officer.)

Any substantial defect in a certificate of acknowledgment is fatal to its validity; *e. g.*, a failure to state that the person who acknowledged that he executed the instrument was known to the officer taking the acknowledgment to be the person described in and who executed the same. *Freedman v. Oppenheim*, 80 App. Div. 487, 81 N. Y. S. 110; *Gross v. Rowley*, 147 App. Div. 529, 132 N. Y. S. 541.

For the proper form of acknowledgment by a corporation, see Real Prop. Law, sec. 309.

### § 641. Proof by Subscribing Witness.

A conveyance or other instrument is said to be "proved by the certificate of a notary public or other officer des-

ignated by statute (Real Prop. Law, secs. 298-301) attached thereto, stating that a subscribing witness to the instrument appeared before the said officer, stated his place of residence and swore that he witnessed the execution of the instrument and knew the individual who executed the same to be the person described therein. The officer must be personally acquainted with the witness, or have satisfactory evidence that he is the same person who was a subscribing witness to the instrument. Real Prop. Law, sec. 304. Such proof can be made only by a witness who subscribed his name to the instrument at the time of its execution. Real Prop. Law, sec. 292; *People ex. rel. L. I. R. R. Co. v. Board of Railroad Comrs.*, 75 App. Div. 106, 77 N. Y. S. 380.

For a form of certificate of proof by subscribing witness, see *Bostwick's Lawyer's Manual*, 2d Ed., p. 1033, form 519.

#### § 642. Theory of Acknowledgment or Proof.

The purpose of the acknowledgment or proof required by statute is to take the place of proof of due execution before the court. Such proof of due execution is made while the persons who executed, or witnessed the execution of, the instrument are alive and available as witnesses, before a designated officer of the court, and stands as *prima facie* evidence of the due execution of that instrument as against all persons who may at any time be interested in the matter. The official signature, as well as the seal in cases where a seal is required (see Real Prop. Law, sec. 308), is always susceptible of proof from the records. The election or appointment of the officer taking the acknowledgment is a matter of public record, and his original signature is invariably attached to his oath of office.

#### § 643. Acknowledgment May Be Made at Any Time.

An instrument may be acknowledged when it is executed or at any time thereafter. *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616. It may be acknowledged even after the action has commenced at any time before it is actually offered in



evidence. *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. S. 1043.

#### § 644. Acknowledgment Prima Facie Evidence.

An acknowledgment is only *prima facie* evidence of the proper execution of an instrument and its execution may be contested by a party affected thereby. Civil Practice Act, sec. 384, subs. 3 and 4. But it has been held that "a certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty." *Albany Co. Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427; *Rock v. Rock*, 195 App. Div. 59, 185 N. Y. S. 656. In the leading case of *Albany Co. Sav. Bank v. McCarty*, *supra*, at p. 83, the Court of Appeals formulated the rule as follows: "We think that, as between the parties, a certificate of acknowledgment, when read in evidence, makes out a *prima facie* case as strong as if the facts certified had been duly sworn to in open court by a witness, apparently disinterested and worthy of belief. The legal presumption of the proper performances of official duty by a public officer requires that this effect should be given it. *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223. While the evidence is not conclusive, as the statute provides that 'it may be rebutted and the effect thereof contested by a party affected thereby,' it is of such a character as, standing alone, to send a case to the jury, so that they may decide between the probative force of the certificate, supported by the presumption that it states the truth, on the one hand, and the evidence produced in rebuttal, whatever it may be, on the other."

#### § 645. What Instruments May Be Acknowledged or Proved.

The Civil Practice Act, sec. 386, provides that:

"Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged or proved, and

certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property."

This provision permitting an acknowledgment of the execution of all instruments other than notes, bills, and wills, merely dispenses with proof of the execution of an instrument duly acknowledged. The usual modes of proving the due execution are dispensed with. But, in the absence of a statutory provision applicable to the instrument in question, the fact that a duly acknowledged instrument, other than a conveyance, has been recorded does not dispense with the necessity of producing the original or accounting for its absence before secondary evidence of its contents is admissible. Such an instrument may not, for example, be proved by a certified copy obtained from the register's office. *Goodman v. Greenberg*, 53 Misc. 583, 103 N. Y. S. 779.

#### § 646. Competency of Public Records. In General.

The foregoing sections have dealt with the admissibility of public documents, as an exception to the Hearsay Rule, and with the manner of proving public documents. It must not be inferred, however, that any duly authenticated public document is admissible in evidence for all purposes merely by virtue of its character as a public record. The following sections will discuss the rules governing the admissibility of duly authenticated public records and the purposes for which some of the most important public records may be received in evidence.

#### § 647. Official Records Required to Be Kept.

Public records which are required by law to be kept are, as a general rule, admissible as *prima facie* evidence of the facts required to be stated therein. *Chamberlayne's Modern Law of Ev.*, Vol. V., sec. 3424; *Civil Practice Act*, sec. 367; *Richards v. Robins*, 178 App. Div. 535, 165 N. Y. S. 780; *Price v. Price*, 194 App. Div. 158, 185 N. Y. S. 570. For

example, where it appeared that, under the State Education Law and the Greater New York Charter, school records were required to be kept, stating the date of birth of children attending the New York public schools, such records were held admissible as some evidence of the age of a child, in an action brought by the child for an annulment of her marriage on the ground of non-age. *Price v. Price*, *supra*. But it is only papers which are required by law to be filed or recorded in public offices, or public records of official acts or findings of fact which are required by law to be kept, that are admissible under this rule. Papers filed or facts recorded without the authority of law are not admissible by reason of being made public records. *Striker v. Striker*, 31 App. Div. 129, 132, 52 N. Y. S. 729; *Polykranas v. Krausz*, 73 App. Div. 583, 77 N. Y. S. 46, *Richardson's Cases in Evidence*, p. 1074.

#### § 648. Registers of Births, Marriages, and Deaths.

In many jurisdictions public records of vital statistics kept pursuant to law, or duly certified copies thereof, are received as *prima facie* evidence of the facts stated therein. 22 C. J., p. 806. To illustrate: For the purpose of proving the age of the insured, in an action on a life insurance policy, the marriage license of the insured and the birth certificates of two children of the insured, all of which stated the age of the insured, as required by statute, were held admissible. *Murray v. Supreme Lodge*, 74 Conn. 715, 52 Atl. 722. Upon the same principle, many authorities hold a public record containing the certificate of a physician stating the fact and cause of a person's death admissible as *prima facie* evidence of the cause of death of the person named therein. *Bozicevich v. Kenilworth Mercantile Co.*, 58 Utah 458, 199 Pac. 406, annotated 17 A. L. R. 346. In New York, however, although there are provisions in the charters and in the municipal ordinances of the several cities of the State requiring the boards of health of the respective cities to keep such records of deaths and the causes thereof, the courts hold that such statutes and ordinances are

police regulations only, and that the records are required to be kept for local and specific purposes and are not public records in such sense as makes them evidence of the facts recorded, in actions between private parties. *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. M. A. Assn.*, 126 N. Y. 450, 458, 27 N. E. 942, 22 Am. St. Rep. 839; *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891, *Richardson's Cases in Evidence*, p. 851; *Beglin v. Metropolitan Life Ins. Co.*, 173 N. Y. 374, 66 N. E. 102, *Richardson's Cases in Evidence*, p. 1067; *Painton v. Cavanaugh*, 151 App. Div. 372, 135 N. Y. S. 418. In *Davis v. Supreme Lodge*, *supra*, the Court of Appeals pointed out that, to admit the certificate of the attending physician as evidence of the cause of death, in an action between private litigants, by reason of a provision in the New York City Charter making all papers on file in the department of health presumptive evidence of the facts recited therein, would be, in effect, to hold the Code of Civil Procedure, sec. 834 (now Civil Practice Act, sec. 352) which protects privileged communications between physician and patient repealed by a local police regulation. The Court pointed out, also, that the section of the Charter in question "is given complete effect when limited to cases in which the health department is seeking by actions or legal proceedings to enforce the ordinances, rules and regulations of the department of health or the health laws as enacted in the sanitary code, and to suits for the collection of the penalties prescribed, or in cases where proof of the proceedings of the board is material." The Court expressed the opinion, however, that, although such records are inadmissible to prove the cause of death, it is quite possible that they may be competent to prove the fact of death, or to prove marriage or birth. Death certificates were held admissible to prove the death of subscribing witnesses to a will in *Matter of Hall*, 90 Misc. 216, 154 N. Y. S. 317.

The question of the admissibility of a birth certificate as evidence of the facts recited therein is still somewhat unsettled in this State. It would seem that there should be



no question as to the admissibility of a birth certificate as evidence of the birth which is entered thereon. Chamberlayne's Modern Law of Ev., Vol. 5, sec. 3430. Nevertheless, dicta may be found in several New York opinions in which the courts express a serious doubt, based on the decisions in the leading death certificate decisions (*Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. M. A. Assn.*, *supra*; *Davis v. Supreme Lodge*, *supra*; *Beglin v. Metropolitan Life Ins. Co.*, *supra*), as to the admissibility of such certificates, for any purpose, in litigation between private parties. *Lee v. Sterling Silk Mfg. Co.*, 134 App. Div. 123, 118 N. Y. S. 852, *Richardson's Cases in Evidence*, p. 1068; *Bilkovic v. Loeb*, 156 App. Div. 719, 141 N. Y. S. 279, *Richardson's Cases in Evidence*, p. 58. In *Pirrung v. Supreme Council*, 104 App. Div. 571, 93 N. Y. S. 575, however, where it appeared that the German birth certificate of the insured, which was offered upon the issue of the age of the insured, was rejected because it was not proved to be a copy of a record kept under the direction of the laws of Germany, the Appellate Division held that the party offering the record should have been permitted to withdraw a juror in order that he might have an opportunity to supply the missing proof for the purpose of rendering the birth certificate admissible. This amounts to a direct ruling that a birth certificate, kept by authority of law, is competent evidence of the date of birth of the person whose birth is there recorded.

The Penal Law, sec. 817, provides that, whenever in any legal proceedings it becomes necessary to determine the age of a child, a duly authenticated transcript of the record of birth recorded in any bureau of vital statistics or board of health shall be competent evidence upon the question of age. As this section is entitled "Presumption of responsibility in general as to child of seven years or more," it is doubtful whether the courts would hold it applicable to a case which did not involve the age of a child as bearing on the capacity of the child to commit a crime. See *People v. Todoro*, 224 N. Y. 129, 133, 120 N. E. 135.



Courts of other jurisdictions sometimes admit birth certificates, not merely as evidence of the birth therein recorded, but as evidence of other facts which are recited therein, pursuant to lay; *e. g.*, the age of the child's parents. *Murray v. Supreme Lodge, supra*. In New York, however, birth certificates are held inadmissible for such purposes. For example, in a divorce action, it was held error to admit a certificate of the birth of the defendant's child which named the defendant and the co-respondent as the child's parents. *Hammerstein v. Hammerstein*, 74 Misc. 567, 134 N. Y. S. 473. The Court said that whether such a certificate would be admissible as hearsay evidence of pedigree was not involved in that case.

If, however, a birth certificate is authenticated as provided by the Civil Practice Act, sec. 398, sub. 3, it is competent evidence of facts contained therein. Therefore, a copy certified according to the form used in a foreign country is admissible where there is a certificate under the hand and seal of a consular officer of the United States to the effect that the document is of record or on file in the foreign country, and a copy of the record is presumptive evidence according to the form in use in the foreign country. *George v. Galani*, 218 App. Div. 840, 219 N. Y. S. 24.

By statute, in New York, a marriage certificate, or duly certified copy thereof, is made presumptive evidence of the marriage. Civil Practice Act, sec. 372.

### § 649. Parish and Church Registers.

Church registers of baptisms, marriages, and burials are admissible, not as public records, but as entries made in the regular course of business, under a well recognized exception to the Hearsay Evidence Rule. *Hartshorn v. Metropolitan Life Ins. Co.*, 55 App. Div. 471, 67 N. Y. S. 13; *Meehan v. Supreme Council*, 95 App. Div. 142, 88 N. Y. S. 821, *aff'd* 194 N. Y. 577, 88 N. E. 1125, *Richardson's Cases in Evidence*, p. 1071; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. S. 72; Penal Law, sec. 817. Unless these records comply with the requirements of this exception to the rule

against hearsay they are inadmissible. *Syrowik v. Foster*, 210 App. Div. 816, 206 N. Y. S. 966. See, also, Law Notes, March, 1925, p. 226.

#### § 650. Census Returns.

Judicial notice may be taken of the facts found in official census returns. A certificate of the census director, attested by the secretary of the interior, may also be received as *prima facie* evidence of the result of the census. Civil Practice Act, sec. 401. But census returns are inadmissible to prove incidental facts stated therein; *e. g.*, the age of persons listed in the returns. *Maher v. Empire Life Ins. Co.*, 110 App. Div. 723, 96 N. Y. S. 496. See, also, *Hegler v. Faulkner*, 153 U. S. 109, 38 Law. Ed. 653, 14 Sup. Ct. Rep. 779.

#### § 651. Weather Bureau Records.

Duly certified copies of the records of the state or federal weather bureau, the United States signal service, or the meteorological observatory of New York City are admissible as evidence of weather conditions at any given time. Civil Practice Act, sec. 375; *Bretsch v. Plate*, 82 App. Div. 399, 403, 81 N. Y. S. 868.

#### § 652. Tax Assessment Rolls.

The weight of authority supports the rule that tax assessment rolls showing the assessed valuation of property are inadmissible as evidence of market value for other than tax purposes. *American State Bank v. Butts*, 111 Wash. 612, 191 Pac. 754, annotated 17 A. L. R. 168. The Appellate Division has held the assessed valuation of property to be some evidence of value in eminent domain proceedings, but the same court held that the commissioners appointed to determine the compensations to be made "are unhampered by technical rules of evidence and unrestricted as to their sources of information." *Matter of Simmons*, 132 App. Div. 574, 116 N. Y. S. 952.

**§ 653. Certificate That Record Cannot Be Found.**

The Civil Practice Act, sec. 366, provides that: "Where the officer to whom the legal custody of a paper belongs certifies under his hand and official seal that he has made diligent examination in his office for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer personally testified to the same." The law presumes that a public officer will perform his official duty by keeping public records safe in his office, and, therefore, if a paper which is required by law to be filed or recorded in a public office is not found there, the presumption arises that no such document has ever been in existence, and, until rebutted, this presumption stands as proof of such non-existence. *Deshong v. City of New York*, 176 N. Y. 475, 485, 68 N. E. 880; *Title Guar. & Trust Co. v. City of New York*, 205 N. Y. 496, 99 N. E. 160.

**§ 654. Notary's Certificate of Presentment and Protest.**

The certificate of a notary public of due presentment of a note or bill of exchange for acceptance or payment or of protest for non-acceptance or non-payment is presumptive evidence of the facts certified, unless the party against whom it is offered has duly served an affidavit denying the receipt of such notice. Civil Practice Act, sec. 368, sub. 1; *Latham v. Sheff*, 193 App. Div. 576 185 N. Y. S. 278; *Richard v. Conn. Elec. Mfg. Co.*, 200 App. Div. 681, 194 N. Y. S. 497.

Where the testimony of a notary public cannot be procured, by reason of his death, insanity, or absence, his original protest, duly authenticated, or a note or memorandum personally made or signed by him, at the foot of a protest or in his official register, is presumptive evidence that notice of non-acceptance or non-payment was sent at the time and in the manner stated. Civil Practice Act, sec. 368, sub 2.

## CHAPTER XXVII.

### DOCUMENTARY EVIDENCE (Continued)

#### Private Documents.

#### § 655. Execution Must Be Proved.

Before a private writing can be received in evidence, the party offering it must show, to the satisfaction of the presiding judge, that it was duly executed by the person who is claimed to have executed it. See numerous authorities collated in 22 C. J., p. 929, note 75; *Longworth v. East River Nat. Bank*, 160 App. Div. 737, 145 N. Y. S. 1051.

#### § 656. When Proof of Execution Is Excused.

No proof of the execution of an instrument is required, however, where it appears that

1. Its due execution is admitted by the adverse party or proof thereof has been waived. The Civil Practice Act, sec. 322, provides for a means of obtaining a written admission of the genuineness of a writing, as follows:

“The attorney for a party, at any time before the trial, may exhibit to the attorney for the adverse party, a paper material to the action and request a written admission of its genuineness. If the admission is not given within four days after the request, and the paper is proved or admitted on the trial, the expenses incurred by the party exhibiting it in order to prove its genuineness must be ascertained at the trial and paid by the party refusing the admission, whatever the result of the cause, matter or issue may be; unless it appears to the satisfaction of the court that there was a good reason for the refusal.”

2. The adverse party relies on the same instrument as a part of his case. 22 C. J., p. 934.

3. The instrument has been acknowledged or proved in the manner required in order to entitle a deed to be recorded. Civil Practice Act, sec. 384, sub. 1 and sec. 386. An acknowledgment, in proper form, taken by an authorized

officer, stands as strong presumptive evidence of the fact of execution. *Albany Co. Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427; *Matter of Pirie*, 198 N. Y. 209, 213, 91 N. E. 587.

4. The instrument can be proved as an ancient document.

5. The document is independently relevant, irrespective of the identity of the party who executed it; *e. g.*, where it is sought to show that a person had seen a certain paper and knew its contents. *Chamberlayne's Modern Law of Ev.*, Vol. V., sec. 3514.

#### § 657. Attested and Unattested Documents.

With respect to the method of proving the genuineness of private writings, they may be divided into two classes; *viz.*, attested and unattested documents. An attested document is one which bears the signature of a person who subscribed his name thereto, at the request or with the assent of the party or parties to the instrument, as a witness of the fact of execution. *Matter of Clute*, 37 Misc. 586, 75 N. Y. S. 1059. It must appear that the instrument was executed in the presence of the attesting witness or that the person who is claimed to have executed it acknowledged to the attesting witness that he executed the same and requested him to sign as a witness of that fact. *Schaffer v. Emmons*, 103 App. Div. 399, 92 N. Y. S. 993; *Matter of Clute*, *supra*; 22 C. J., p. 937.

#### § 658. Attested Documents. Common Law Rule.

Under the common law rule, which is still followed in most jurisdictions, the execution of an attested writing must be proved by the subscribing witness or witnesses, or their failure to testify must be satisfactorily accounted for. *Fox v. Reil*, 3 Johns. (N. Y.) 477; *Chamberlayne's Modern Law of Ev.*, Vol. V., sec. 3515. See numerous authorities cited in 22 C. J., p. 936, note 60. The reason of the rule requiring proof by a subscribing witness is that such witness was agreed upon by the parties as the person to be called upon for proof of the execution of the instrument



and that he is presumed to have better knowledge of the facts than other persons. *Hollenback v. Fleming*, 6 Hill (N. Y.) 303.

**§ 659. Attested Documents. New York Rule.**

The common law rule has been so modified by statute in New York as to make it apply only to documents which are required by law to be attested. The Civil Practice Act, sec. 331, provides that:

“Except in the case of written instruments to the validity of which a subscribing witness or subscribing witnesses is or are necessary, whenever, upon the trial of any action or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto.” Therefore, even though an instrument be attested, unless its validity depends upon a subscribing witness, its execution may be proved in the same way as that of an unattested writing.

**§ 660. Witnesses Necessary to Validity of Instrument Must Be Called.**

Where subscribing witnesses are necessary to the validity of a writing, such witnesses must be called, or their absence satisfactorily accounted for. For example, before a will can be admitted to probate, two, at least, of the subscribing witnesses must be examined, if so many are within the state and competent and able to testify. Surrogate's Court Act, sec. 141. This is for the reason that two subscribing witnesses are necessary to the validity of a will in this state. Dec. Est. Law, sec. 21.

**§ 661. Absence of Necessary Witness. How Accounted for.**

The absence of the testimony of a necessary subscribing witness is sufficiently accounted for when it is shown, to

the satisfaction of the court, that he is dead, insane, or otherwise incompetent to testify, that he cannot be found after diligent search, or that his testimony cannot be procured by reason of his illness or absence from the jurisdiction. 22 C. J., p. 938; Chamberlayne's Modern Law of Ev., Vol. V., sec. 3527. The Surrogate's Court Act, sec. 142, provides that when, upon a probate proceeding, such facts have been shown to the satisfaction of the surrogate, he may make an order dispensing with the testimony of the witness. When a subscribing witness to a will is absent from the state and his testimony can be obtained by commission, the surrogate may, in his discretion, and must, upon the demand of either party, require his testimony to be so taken. Surrogate's Court Act, sec. 142.

**§ 662. Subscribing Witness Testifying Unfavorably.**

Where a subscribing witness testifies against the execution of the instrument or has no recollection of the matter, the instrument may, nevertheless, be supported, for other evidence may then be resorted to for the purpose of proving its execution. Surrogate's Court Act, sec. 142; *Matter of Cottrell*, 95 N. Y. 329; *Matter of Sizer*, 129 App. Div. 7, 113 N. Y. S. 210, *aff'd* 195 N. Y. 528, 88 N. E. 1132.

**§ 663. Evidence Required to Prove a Will When Testimony of Subscribing Witnesses Dispensed With.**

The Surrogate's Court Act, sec. 142, provides that: "Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone.

"If all the subscribing witnesses to a written will be dead, or incompetent, by reason of lunacy or otherwise, to testify, or unable to testify, or are absent from the state and their testimony has been dispensed with as provided in this section, or if a subscribing witness has forgotten the occur-

rence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action." See *Matter of Cottrell*, 95 N. Y. 329. A full attestation clause, together with proof of the signatures of the testator and the subscribing witnesses has been held sufficient evidence, under this section, to make out a *prima facie* case for the will. *Matter of Sizer*, 129 App. Div. 7, 113 N. Y. S. 210, *aff'd* 195 N. Y. 528, 88 N. E. 1132; *Matter of Sniffin*, 113 Misc. 307, 184 N. Y. S. 538. See, also, *Matter of Rosenthal*, 100 Misc. 84, 164 N. Y. S. 1060.

**§ 664. Unattested Documents. Evidence to Show Due Execution.**

The due execution of an unattested private document, or one which is not required by law to be attested may be proved by any competent evidence of the fact. Thus, the execution may be proved by the testimony of a person who was present at the time and saw the party affix his signature to the instrument. *Dundy v. Chambers*, 23 Ill. 369, 372. Or it may be proved by the testimony or the admissions of the persons who executed it. See authorities cited in *Chamberlayne's Modern Law of Ev.*, Vol. V., sec. 3513, note 11. The most frequent mode of proving the execution of a writing is by proof of the handwriting of the maker. *Pullen v. Hutchinson*, 25 Me. 249; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145; *United States v. Moreno*, 1 Wall. (U. S.) 400, 17 Law. Ed. 633; *Rogers v. N. Y. and Brooklyn Bridge*, 11 App. Div. 141, 42 N. Y. S. 1046, *aff'd* 159 N. Y. 556, 54 N. E. 1094. Where a person denies the execution of an instrument and offers in support of his denial evidence that he cannot write, the writing should be admitted. His denial of his signature then becomes a question for the jury. *Malulo v. Resolved Corp.*, 217 App. Div. 777, 217 N. Y. S. 64.

**§ 665. Proof of Handwriting.**

Proof of the handwriting of a person who is claimed to have executed an instrument may be made either by the testimony of a witness who has sufficient knowledge of the handwriting of the person in question to qualify him to express an opinion or by a comparison of the disputed signature with any writing which is admitted or proved, to the satisfaction of the court, to be the genuine handwriting of the person claimed to have executed the disputed instrument. Civil Practice Act, sec. 332. Such comparison may be made by an expert witness or by the jury.

**§ 666. General Rules of Evidence Applicable to Private Documents.**

The foregoing sections have dealt with the authentication and manner of proving private documents. The admissibility of any duly authenticated private document is, of course, governed by the general rules of evidence discussed in the foregoing chapters. If a document is relevant and material and is not inadmissible under any of the exclusionary rules, it may be received in evidence, when properly authenticated. See, for a discussion of the Best Evidence Rule, Chapter IX, and of the Parol Evidence Rule, Chapter XXI. See, also, Chapter XII, section 290, in which the New York Statute governing admission of unattested documents is set forth.

The following sections will discuss the uses in evidence of a few of the more important private documents.

**§ 667. Letters and Telegrams.**

Letters and telegrams are, of course, constantly introduced in evidence to prove contracts or other facts in issue or as containing admissions. Where one party introduces in evidence a part of a correspondence, his opponent is entitled to introduce the rest, so far as it tends to explain or rebut any inferences which might be drawn from the part first introduced. *Grattan v. Metropolitan Life Ins.*

Co., 92 N. Y. 274, 284, Richardson's Cases in Evidence, p. 625; Warfield v. Wire Wheel Corp., 107 Misc. 528, 177 N. Y. S. 733, aff'd 191 App. Div. 899, 180 N. Y. S. 957.

### § 668. Book Entries.

Written statements made in books of account or in books kept regularly for business purposes are frequently admissible, even though they are self-serving declarations and hearsay evidence. They must, however, meet all of the requirements of one or the other of the exceptions to the Hearsay Rule known as the Shop Book Rule and the rule as to Entries made in the Regular Course of Business.

### § 669. Books of Corporations.

As a matter of convenience, the books of a corporation are, as a general rule, held admissible for the purpose of proving such facts as its incorporation, list of stockholders, by-laws, and the formal proceedings and resolutions of its board of directors. For such purposes, the books are received as evidence even against strangers to the corporation. Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, Richardson's Cases in Evidence, p. 1075.

If a resolution is correctly recorded, the minutes offered are the best evidence as to its contents, and no other evidence is competent. Durbrow v. Hackensack Meadows Co., 77 N. J. L. 89, 71 Atl. 59, Richardson's Cases in Evidence, p. 362. So, also, in an action to recover the amount of dividends declared by defendant directors from the capital instead of from the surplus, it is proper to admit in evidence the corporate books to show the financial condition of the corporation. Wesp v. Muckle, 136 App. Div. 241, 120 N. Y. S. 976, Richardson's Cases in Evidence, p. 364. The Court distinguished the situation in this case and that in Rudd v. Robinson, *supra*, by stating that this case was an exception to the general rule which the Rudd v. Robinson case recognized. In the absence of a statute, the books of a corporation are generally held inadmissible, on behalf of the corporation or its members, for the purpose of proving



an account or establishing a debt or claim against a third party. 22 C. J., p. 898. See *Sigua Iron Co. v. Broun*, 171 N. Y. 488, 496, 64 N. E. 194. This is, of course, subject to the exception in favor of the admissibility of Entries made in the Regular Course of Business.

### § 670. Books of Foreign Corporations.

The Civil Practice Act, sec. 373, provides that: "Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose as presumptive evidence, whether any or all of the parties are or are not members of the corporation." In an action by a foreign corporation to recover unpaid calls upon shares of its stock standing in the name of the defendant, the books of the corporation were held admissible, under this section, as evidence of the fact that sixty shares of partly paid stock had been transferred to the defendant on the books of the corporation and a certificate issued to him. The Court held that it was not necessary that each entry in the books should be proved to be correct by the person actually making it. *Sigua Iron Co. v. Broun*, 171 N. Y. 488, 64 N. E. 194.

The Civil Practice Act, sec. 374, provides for proof of the books of a foreign corporation, or of entries therein, by means of sworn copies. But copies cannot be used where the corporation is a party to the action and seeks to prove its own act or transaction.

### § 671. Newspapers and Trade Journals.

A newspaper or trade journal is, of course, inadmissible as evidence of the facts stated therein because it is pure hearsay. *Downs v. N. Y. C. R. R. Co.*, 47 N. Y. 83. Newspapers may be received in evidence for some purposes, however; *e. g.*, to prove the publication of an article claimed to be libelous; or, when shown to contain properly authenticated market reports, as evidence of market value. In *Commonwealth of Virginia v. West Virginia*, 238 U. S. 202,

59 Law Ed. 1272, 35 Sup. Ct. Rep. 795, the Court, speaking through Mr. Justice Hughes, said: "It is unquestioned that in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence." See, also, *Watts v. Phillips Jones Corp.*, 211 App. Div. 523, 207 N. Y. S. 493. The cases are collated in an Editorial, *New York Law Journal*, April 22, 1925.

### § 672. Photographs.

Properly authenticated photographs are admissible in evidence whenever it is competent to describe the physical characteristics of a person, place, or thing. *Cowley v. People*, 83 N. Y. 464, 476, 38 Am. Rep. 464; *People v. Webster*, 139 N. Y. 73, 83, 34 N. E. 730. Photographs are properly authenticated by the testimony of one or more witnesses familiar with the subject portrayed that the photograph is a correct representation or a good likeness of the person, place, object, or condition sought to be described. *Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 77, 88, 23 N. E. 35. The testimony of the photographer who took the pictures has been held a sufficient authentication. *Cowley v. People*, *supra*.

### § 673. Diagrams, Maps, and Building Plans.

Diagrams, maps, etc., are admissible in connection with the testimony of witnesses who have testified to their correctness. For example, in negligence actions, maps or diagrams of the scene of the accident are frequently admitted in connection with the testimony of witnesses. *Clegg v. Metropolitan Street Ry. Co.*, 1 App. Div. 207, 37 N. Y. S. 130, *aff'd* 159 N. Y. 550, 54 N. E. 1089.

Properly authenticated building plans and specifications are admissible as evidence of the terms of building contracts. *Burling v. Lighte*, 51 App. Div. 603, 64 N. Y. S. 264.

**§ 674. Statistical Tables.**

Standard statistical tables are admissible as evidence of the data and computations contained therein.

**§ 675. Books of Science and Information Inadmissible.**

Scientific books, such as standard medical works, as well as encyclopedias, text books, learned treatises on art, etc., are inadmissible as evidence of the facts or opinions stated therein. *Matter of Mason*, 60 Hun 46, 14 N. Y. S. 434; *Pahl v. Troy City Ry. Co.*, 81 App. Div. 308, 81 N. Y. S. 46; *Gallagher v. Market Street R. R. Co.*, 67 Cal. 13, 6 Pac. 869; *Jones on Ev.*, sec. 578.

**§ 676. Almanacs.**

A reputable almanac, although not strictly admissible in evidence, may be handed to the court for the purpose of refreshing its recollection as to the time of the rising or setting of the sun or moon on a given day or any similar fact which may be judicially noticed.

**§ 677. Stamp Act. Admissibility of Unstamped Instruments.**

Federal and State Laws may provide, for the purpose of taxation, that certain certificates of stock, promissory notes, mortgages, and other instruments shall, when issued, sold, or transferred, be duly stamped with internal revenue stamps. The question frequently arises as to the admissibility in evidence of unstamped instruments which are required by law to be stamped. Unless a statute expressly declares void an unstamped instrument or expressly excludes it from evidence, the policy of our courts is to admit the instrument in evidence.

Notwithstanding the many enactments and repeals of the Revenue Acts of Congress during the past thirty years, the United States District Court in *United States v. Masters*, 264 Fed. 250, (1920) held that the Act of 1898, in so far as it expressly prohibits the use of unstamped documents as

evidence in any court, was not repealed by subsequent legislation, and apparently, the Revenue Act of 1921 does not repeal that part of the Revenue Act of 1898 which prohibits the use of unstamped documents as evidence. See Cumulative Supp., U. S. Comp. Statutes, 1925, note to sec. 6318 hh; *United States v. Masters*, *supra*.

It should be noted that a Federal Statute or Act of Congress which prescribes certain rules of evidence, while binding on the Federal courts, is in no way operative in the State courts. *People ex rel. Barbour v. Gates*, 43 N. Y. 40; *Bedall v. Moore*, 199 App. Div. 531, 191 N. Y. S. 826; *People ex rel. Consumers' Brewing Co. v. Fromme*, 35 App. Div. 459, 54 N. Y. S. 833.

New York is without a statute which makes void or which expressly prohibits the use in evidence of an unstamped instrument. But no action based on the transfer of certificates taxable under the New York State Tax Law may be brought unless the tax is paid at the time of transfer. New York State Tax Law, sec. 278. The law merely affects enforceability. *Bean v. Flint*, 204 N. Y. 153, 97 N. E. 490; *Luitwieler v. Luitwieler Pumping Engine Co.*, 231 N. Y. 494, 132 N. E. 401. In *Gregory v. Hitchcock Publishing Co.*, 31 Misc. 173, 63 N. Y. S. 975, the Court held that the failure to attach stamps to a promissory note did not invalidate the instrument.

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